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A

ABANDONMENT.

See LANDS AND LAND TITLES, 22.

ACKNOWLEDGMENT.

See CONVEYANCES, 1, 2, 5, 6.

ADMINISTRATION.

1. *Administration — Final settlement — Approval, effect of.* — Final settlements of executors, administrators and guardians, when regularly approved, have the force of judgments, and can only be attacked for fraud; but such fraud may be positive and actual, with intent to cheat and wrong those interested, or may consist in any improper act or concealment which operates as a fraud and results in loss, whatever the motive. — Clyce v. Anderson, Executor of Griswold, 37.

2. *Administrator's final settlement — Inventory — Bill of sale — Interest on discretionary, when.* — Executors and administrators are not to be charged with interest upon the inventory and sale bill of the trust estate, as of course. Where interest has not been actually collected, it is matter of discretion with the Probate Court whether to charge those officers with it or not; and in proceedings to set aside final settlements by them on the ground of fraud, this court will not review such discretionary action by the Probate Court. — *Id.*

3. *Administration — Administrator and administrator* de bonis non *— Joinder as defendants.* — The administrator *de bonis non*, and not the creditor, is the proper person to pursue the estate. But this principle cannot authorize a creditor to join both parties defendant in a proceeding to set aside their several settlements for fraud. If the action be well grounded, the judgment should be to set aside the old settlement, in whole or in part, and order a new one. But neither in setting aside the old settlement nor making the new one, can any judgment be rendered against the administrator *de bonis non*. So far as a proceeding to set aside their settlements are concerned, their accounts are separate and independent, and there is no reason why they should be joined. — Kerrin v. Roberson, 252.

4. *Limitations — Surety — Administration.* — Payment of a note by a surety extinguishes the note and gives him the right to sue for the money paid. His right of action accrues from the date of the payment, and the statute of limitations under the administration law commences running from that time. — Burton v. Rutherford, Adm'r of Rutherford, 255.

ADMINISTRATION—(*Continued.*)

5. *Partnership — Claim against — Allowance of.*— An allowance of a claim against a partnership is not an exhibition of it against the individual estate.—*Id.*

6. *Administrator of deceased co-partner — Bondsmen not liable for malversation of partnership effects.*— The sureties on the bond of an administrator of the individual estate of a deceased co-partner are not liable for his malversation of partnership assets. The inventory and appraisement, provided for in sections 53 and 54 of the Administration Act touching partnership estates (Wagn. Stat. 78), are for the purpose of ascertaining the inventory of the deceased member, but they do not authorize the administrator on the personal assets to take charge of the partnership property or exercise any control over the same. Such acts are not within the sphere of his duties, and his bond does not cover them. He may take out letters of administration on the partnership estate, but in that case he must give a new bond, and he acts in a new, separate and distinct capacity — Orrick, Adm'r of Vahey, v. Vahey, 428.

7. *Administration—Construction of statute.*—Section 67 of the administration act (Wagn. Stat. 81) applies to St. Louis county.—Wickham, Adm'r of Wash, v. Page, 526.

8. *Administrator* de bonis non — *Action against predecessor — Notice — Construction of statute.*— An administrator *de bonis non*, on giving fifteen days' notice thereof, will be entitled to summary process, under section 67 of the administration act (Wagn. Stat. 81), against his predecessor to compel the surrender of the moneys and effects in the hands of the latter, notwithstanding the absence of an express provision in the statute requiring notice to be given defendant. He is also entitled to his action on his predecessor's bond, but is not restricted to that remedy.— *Id.*

See CONTRACTS, 2; DOWER, 1, 3, 4, 5.

ADVERSE POSSESSION.

See CONVEYANCES, 8; LANDS AND LAND TITLES, 16, 25, 26.

AGENCY.

1. *Agency — Deed of trust — Fraud* — Res gestæ.—The grantor in a chattel deed of trust remained in possession, and failed to have it recorded within the proper time, but requested the recorder to file it for record and return it, saying that there was some trouble about the property and he might wish to alter it. The property being attached in the hands of the grantor, on the claim that the deed was fraudulent, and being replevied by the grantee, the former would be held to have acted as agent of the latter in the transaction with the recorder, and his statements would bind the grantee, in the absence of any proof that the grantor was wrongfully in possession of the property, or that the grantee repudiated his transaction with the recorder.— Haenschen v. Luchtemeyer, 51.

2. *Agency — Collector liable to principal, in what cases.*— In suit for moneys charged to have been collected on execution and not paid over, defendant should not be charged with goods sold defendant by the execution-defendant not actually applied on the execution, or not received by him as collector; but where, at the execution sale, he bade in property in his own name, and entered satisfaction of the execution to the extent of the bid as for cash

AGENCY—(*Continued.*)
received, and treated the property as his own, he would be liable for that amount to his principal.— Warren v. Hawkins, 137.

3. *County Court — Justice acting as agent — Agency — Fraud may be proved, how.* — In suit by a county on a bond given the County Court for money loaned, the defense will be a good one which charges that one of the county justices, acting as agent for the county, procured the signature of defendant as surety by fraudulent misrepresentations. If the justice assumed to act as agent, and his acts were approved by the court, such approval is a sufficient ratification of his agency; and his agency and fraudulent conduct may both be shown in evidence.

Where, however, the principal on the bond, without the knowledge of the creditor, procures the signature of the surety by such fraud, the latter will not be released, but must seek his remedy against the principal.— Gasconade County, to use, etc., v. Sanders, 192.

4. *County Court — Agency and sub-agency.* — The County Court is the only agent for loaning school moneys, and cannot appoint a sub-agent.— *Id.* per Bliss, Judge, dissenting.

5. *Counties, powers of.* — In the employment of agents, counties have not even the powers conferred on ordinary corporations. They are merely *quasi* corporations, political divisions of the State, and they act in subordination to, and as auxiliary to, the State government. — Ray County, to use, etc., v. Bentley, 236.

6. *Insurance companies — Draft — Agency.* — Where the by-laws of an insurance company gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and it appears that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, which drafts were honored and paid off, the community and those who dealt with him had a right to presume that authority had been delegated to him for that purpose, and the company would be bound for the payment of such drafts. — Fayles v. National Insurance Co., 380.

7. *Agency — Sale of land — Commission — Contract — Different terms.* — A sale of land made by an agent on different terms from those directed by his employer will not bind the latter, although more advantageous than those called for by their contract. But a ratification by the principal of an agreement to sell the land on different terms is equivalent to a prior authority, and the principal will be bound for the amount of commissions agreed upon. And he cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disabling him from performance.— Nesbitt v. Heker, 383.

See BILLS AND NOTES, 5, 6; INSURANCE, FIRE, 3; PRACTICE, CIVIL—PLEADING, 5.

ALIENS.
See CONTRACTS, 1, 3.

ALIMONY.
See DIVORCE AND ALIMONY.

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See PRACTICE, CIVIL, 2.

ASSIGNMENTS.

1. *Assignment, what instrument sufficient to constitute.*— The absolute owner of personal property has the right to make a voluntary assignment of the same, by any description which, together with parol evidence, may ascertain the property conferred. — State, to use of Patrick, v. Keeler, 548.
2. *Assignment, fraudulent — Fraud must be participated in by assignee, etc.*— In an action attacking an assignment as fraudulent, in order to set aside the deed the creditors must make it appear not only that the assignment was fraudulent on the part of the assignor, but that the fraud was participated in by the assignee, and that issue must be determined by the jury when there is any conflict of evidence.— *Id.*

ATTACHMENT.

1. *Attachment — Affidavit, sufficiency of. — Semble*, that an affidavit in an attachment suit that deponent "has good reason to believe that defendant has absconded," etc., without alleging that "he does believe," etc., is sufficient. — Massey v. Scott, 278.
2. *Attachment — Judgment, general — Valid, when.*—Where suit is begun by publication and attachment, judgment will bind only the property attached; but a general judgment in such case, although informal, is nevertheless valid till reversed, and will authorize the issue of a special execution against the property attached, and is such a judgment as a court would at any reasonable time correct by an entry *nunc pro tunc*. — *Id.*
3. *Attachment—Order of publication, copy of—Errors, what taken advantage of collaterally.*—The publication of an original order of publication instead of the copy, although irregular, would be a substantial compliance with the statute; certainly not such an error as to be taken advantage of collaterally, as by defendant in ejectment brought by the purchaser of land at an attachment sale. — Groner v. Smith, 318.
4. *Executions, special — Continuance of.*—A special execution in attachment suits may continue after the return term, with like force as general executions on general judgments in attachments or in any other suits. — *Id.*
5. *Attachment — Bond — Issue of in vacation — Estoppel.*— A bond given under the third provision of section 48 of the attachment act (Wagn. Stat. 191), if approved by the judge in vacation, may not be good under the statute, but is nevertheless a valid common-law bond. And the maker of the bond, having by his own acts brought about the dissolution of the attachment and abandonment of the lien and the substitution of the bond, will not afterward be permitted to deny its validity. — Williams v. Coleman, 325.
6. *Attachment, sale under—Notice by handbills — Purchaser at sale.*— Notice of a sale under attachment, given merely by handbills, in a county where a newspaper is published, is in law no notice at all. Where a stranger purchases for a good and adequate consideration, in ignorance of this irregularity, and receives a deed good upon its face, the sale should be received as valid, notwithstanding the sheriff's neglect in regard to the notice; and such a sale might sustain a link in a chain of title, even if the purchase were made by the execution-plaintiff, in favor of his innocent grantees. But it cannot be held to give him such an interest as to entitle him to relief in equity.—Curd v. Lackland, 451.

See CONTRACTS, 4; GARNISHMENT; MORTGAGES AND DEEDS OF TRUST, 4; VENDOR'S LIEN, 1, 2.

ATTORNEYS AT LAW.

1. *Revenue — Power of taxation may be delegated — Language used must be concise.* — The power of the State to tax all professions is unquestioned; and the State may delegate the authority, but the delegation should be made in clear and unambiguous terms. — City of St. Louis v. Laughlin, 559.

2. *Attorneys at law — License tax invalid — Charter — Rule* ejusdem generis. — The charter of the city of St. Louis, approved March 4, 1870, provided (art. III, § 9) that the mayor and city council should have power to license "auctioneers, grocers, merchants, retailers, hotels, * * * hackney carriages, omnibuses, carts, drays and other vehicles, and all other business, trades, avocations or professions whatever." The profession of "law" was not specifically enumerated in the section. *Held*, that under said provision the city council of St. Louis had no power to pass an ordinance levying a tax on attorneys at law. The rule is, where general words follow particular ones, to construe them as applicable only to persons or things of the same general character or class. And in the case mentioned, the profession of law was not *ejusdem generis*, and could not be embraced in the purview of the act. — *Id.*

B

BAILMENTS.

See CONTRACTS, 10; SHERIFFS, 1.

BANKS AND BANKING.

1. *Brokers — License — Savings banks, officers of — Indictment.* — Savings banks incorporated under chapter 68, Gen. Stat. 1865, p. 365, §§ 1–4, are liable to be taxed on their capital and property, but are not required to take out license as brokers under the statute on that subject. (Wagn. Stat. 247.) The provisions of the statutes concerning money brokers and exchange dealers, apply only to moral agents who are capable of taking oaths and suffering the penalties inflicted for perjury. And an individual who engages in broking, not on his own account, but solely in his capacity as officer of such corporation, is not subject to indictment for failure to take out a license. — State v. Field, 270.

See REVENUE, 10.

BILLS AND NOTES.

1. *Bills and notes — Action upon* — Descriptio personæ. — A note made payable to "the superintendent of the Decatur Agricultural Works" may be sued on by the payee in his own name, describing himself as such superintendent. — Durfee v. Morris, 55.

2. *Promissory notes — Escrow — Oral proof — Written contract, when varied by.* — A promissory note may be delivered to a stranger, to be held by him as an escrow, to take effect on the happening of a future contingent event. But where it was held by the payee, the doctrine of escrow can not arise; and no fraud being charged, proof of an oral agreement by which the note was to become legally binding, not from its delivery according to its tenor, but on the happening of a certain contingency, is inadmissible. Such testimony varies the effect of a written contract. — Massmann v. Holscher, 87.

3. *Promissory notes — Execution — Denial of, may be sworn to, when.* — Where defendant in a suit on a promissory note was no party to the instrument, but through mere inadvertence failed to verify his denial of its execution,

BILLS AND NOTES—(*Continued.*)

(Wagn. Stat. 1046, § 45) he should be permitted on suitable terms to make the affidavit.— Anderson, Adm'r of Gentry, v. Hance, 159.

4. *Notes — Purchase-money — Payment, etc.*—In suit on part of the notes given for the purchase-price of land, defendant will make out his case by proving payment of the notes sued on, without further proof that the remainder of the notes not embraced in the allegation had also been paid.— Scroggs, Adm'r of Shields, v. Cook, 305.

5. *Notes* — Descriptio personæ.— An agent or officer of a corporation who puts his own name officially to an obligation, and not the name of the principal or the corporation, does not thereby necessarily make it his own personal obligation.— McClellan v. Reynolds, 312.

6. *Notes — Signature of officer — Latent ambiguity.* — Suit was brought upon the following note: * * * "For value received I promised to pay A. & B. $645, * * * for building a school-house in school district No. 3, township 51, range 21, with 10 per cent. * * * (Signed) P. T. Reynolds, Local Director."

Held, that the indications on the note were that defendant did not intend to make a personal contract, but gave the paper on a settlement for work done for his school district, and that averments showing such to be the case were properly set up in the answer. They did not vary the instrument, but only went to explain its latent ambiguity.— *Id.*

BONDS.

1. *Bond — Penalty — Liquidated damages—Question one of intent.*—Whether a sum inserted in an instrument, to be paid in case of breach, is to be regarded as a penalty or liquidated damages, must be determined by the nature of the contract and its provisions. If the whole scope of the writing shows that it is intended as a penalty, it will be so treated, without reference to any particular language the parties may have used. — Hamaker, Adm'r of Hamaker, v. Schroers, 406.

2. *Bond — Agreements and conditions of — Liquidated damages.* — A. entered into a contract with B., by the terms of which A. agreed to deliver to B. 100 grain and seed drills of a particular pattern, within a specified time. The full contract price of the drills was $1,600, and A. was to be at the whole expense of getting them up. As an indemnity, and to guarantee the faithful performance of the contract, he executed and delivered a bond in the sum of $1,600, conditioned that he would fully comply with the agreement. *Held*, that the amount named in the bond should be treated as a penalty, and not as liquidated damages. — *Id.*

See ADMINISTRATION, 6, 8; AGENCY, 3, 4; ATTACHMENT, 5; CONTRACTS, 4; EVIDENCE, 1; REPLEVIN, 3; ST. JOSEPH BRIDGE CO., 1

BONDS, GUARDIANS'.

See GUARDIAN AND WARD, 3.

BONDS, OFFICIAL.

See SHERIFF, 5, 6.

BONDS, PACIFIC RAILROAD.

1. *Bonds, Pacific Railroad — Payable, when — Out of what fund — By whom — In what money.*— 1. The State Pacific Railroad bonds of January 15,

BONDS, PACIFIC RAILROAD—(*Continued.*)

1852, are payable twenty years from date, and the time of their payment is not postponed by the provision incorporated in the bonds making them redeemable, in the pleasure of the Legislature, at any time after the expiration of twenty years.

2. Said bonds can only be paid out of a fund expressly appropriated for that purpose by the Legislature.

3. The State interest fund created by the act of 1855 (R. C. 1855, p. 1487) and the State sinking fund created by the act of 1865 (Wagn. Stat. 1281; see also Sess. Acts 1871, p. 80), were appropriated for the payment of these among other State bonds.

4. Payment is to be made by the State commissioners created by said acts, without any further order than that contained in the acts. If there be not funds enough on hand to pay the bonds as they mature, they are required to sell such bonds as they may have purchased, so as to raise money for that purpose.

5. Said bonds, according to their terms, are payable in gold or silver coin. And this provision contained in the bonds is not overruled by the legal-tender acts passed by Congress in 1862. And it would be a breach of the contract entered into by the State in issuing these bonds to order their payment in legal-tender notes. — Opinion of Court in response to the Governor, 216.

2. *State bonds — Governor, authority of to contract for payment in specie.*— The State by the course of its Legislature is estopped from now disputing the authority of the governor to contract for the payment of State bonds in gold and silver. — *Id.*

BONDS, TITLE.

See CONTRACTS, 6.

BOUNDARIES, COUNTY.

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BROKERS.

1. *Brokers—License—Savings banks, officers of—Indictment.*—Savings banks incorporated under chapter 68, Gen. Stat. 1865, p. 365, §§ 1–4, are liable to be taxed on their capital and property, but are not required to take out license as brokers under the statute on that subject. (Wagn. Stat. 247.) The provisions of the statutes concerning money brokers and exchange dealers apply only to moral agents who are capable of taking oaths and suffering the penalties inflicted for perjury. And an individual who engages in broking, not on his own account, but solely in his capacity as officer of such corporation, is not subject to indictment for failure to take out a license.— State v. Field, 270.

2. *Revenue — County Collector — County tax, payment of — License — Construction of statute — Mandamus.*—Under the act of 1868, concerning county revenue (Wagn. Stat. 1196, § 76), and the act concerning brokers (Wagn. Stat. 249, §§ 6, 7), taken together, a county collector may levy a tax, not exceeding by one hundred per cent. the State tax, upon the license of a broker; and *mandamus* will not lie to compel the delivery of the license until such county tax is paid.— State ex rel. Meyers v. Spencer, 342.

C

CARRIERS.

See INSURANCE, FIRE, 3.

CERTIORARI.

1. *Certiorari should be instituted in Circuit Court.*—Unless for special reasons full justice cannot be done by commencing proceedings in *certiorari* in the Circuit Court, this practice will always be required.—Owens v. Andrew County Court, 372.

2. *Collector — Accounts — Investigation of by County Court — Certiorari — Construction of statute.*—Where a County Court ascertained a balance to be due from the county collector to the county, ordered its payment, and, on his failure to respond, rendered judgment by default against him at the next term and ordered execution to issue thereon (see Gen. Stat. 1865, p. 228, §§ 19–26), *held:*

1st, that the action of the court was judicial and subject to review on *certiorari.*

2d, that the above provisions were not repealed by implication by the act of 1863–4 (Gen. Stat. 1865, p. 130, § 128), providing for a different method of rendering judgment. The former statute is still in force. (Saline County Subscription case, 45 Mo. 52, commented on.)—*Id.*

See ST. CHARLES, CITY OF, 1, 3.

CHAMPERTY.

See ESTOPPEL, 7.

CHILLICOTHE, CITY OF.

1. *Chillicothe — Corporate limits.*—The act of March 4, 1869 (Sess. Acts 1869, p. 96), extending the corporate limits of the city of Chillicothe, Mo., is constitutional.—Walden v. Dudley, 419.

COLLECTORS.

See AGENCY, 2; PRACTICE, CIVIL—PLEADING, 4; REVENUE.

CONSIDERATION.

See CONTRACTS, 1, 5, 10, 11; EQUITY, 8; SALES, 2.

CONSTITUTION OF MISSOURI.

1. *Oblivion and indemnity, statute of — Plea raising — What necessary to be shown under.*—A defendant pleading that the acts charged against him were done in pursuance of orders received from United States military tribunals or officers, in accordance with section 4, art. XI, of the State constitution, need not show that the authority of the tribunal or officer was rightful and regal in the particular matter in question.—State ex rel. Judge v. Gatzweiler, 17.

2. *Sheriff — Bond — Action on — Money paid over under military orders — United States constitution — Impairing obligation of contract.*—A sheriff is not a mere bailee of money coming into his hands, who is exonerated from liability by the exercise of ordinary care and diligence. His duty is to pay over the money to those legally entitled thereto, and his bond has the force of a contract that he will not fail upon any account to make the payment. Hence, section 4 of art. XI, of the State constitution, in so far as it releases

CONSTITUTION OF MISSOURI—(*Continued.*)

him from such liability, even where the fund was misapplied in pursuance of military orders, is in conflict with the constitution of the United States as impairing the obligation of a contract. — *Id.*

3. *Constitution — Opinion of Supreme Court — Governor entitled to, when.*— The judges of the Supreme Court have the right to determine for themselves whether the "occasion" is such as, under section 11, art VI, of the State constitution, to warrant the governor in calling upon them for their opinion. — Opinion of the Court in response to the Governor, 216.

4. *Bill of rights, section 30 — Proceedings under, imperative.*— Section 30 of the Missouri bill of rights, which declares that "all property subject to taxation ought to be taxed in proportion to its value," is a prohibition against taxation in any other mode. The word *ought* therein used is not directory but mandatory.— Life Association of America v. Board of Assessors, 512.

5. *Constitution of Missouri — Treasurer.*— The treasurer has no discretionary power, and can only disburse as the law-making power shall direct. (Art. XI, § 6.) — State ex rel. Blakeman v. Hays, 604.

See MILITARY SEIZURE, 1, 2; PRACTICE, SUPREME COURT, 8; REVENUE, 18, 19, 20, 22.

CONSTITUTION OF THE UNITED STATES.

1. *United States constitution — State retrospective laws not forbidden by, when.*—The constitution of the United States does not prohibit a State from enacting retrospective laws or ordinances of a civil nature which take away a right of action or divest rights invested in an individual, if these laws do not impair the obligation of a contract nor divest settled rights of property.— State, to use of Judge, v. Gatzweiler, 17.

2. *Sheriff — Bond — Action on — Money paid over under military orders — United States constitution — Impairing obligation of contract* — A sheriff is not a mere bailee of money coming into his hands, who is exonerated from liability by the exercise of ordinary care and diligence. His duty is to pay over the money to those legally entitled thereto, and his bond has the force of a contract that he will not fail upon any account to make the payment. Hence, section 4 of art. XI, of the State constitution, in so far as it releases him from such liability, even where the fund was misapplied in pursuance of military orders, is in conflict with the constitution of the United States as impairing the obligation of a contract.—*Id.*

3. *Sheriff — Bond — Action on — Statute of limitations commences running, when — Act of Congress — Jurisdiction of Federal courts.*—A sheriff who, during the late rebellion, and subsequent to March, 1863, misapplied money in his hands, under a military order of the United States, will be protected against any action therefor in the courts of this State, brought more than two years after the date of his return showing the execution to have been satisfied. The Congressional act of limitations (12 U. S. Stat. 757) is binding on State as well as Federal courts.— *Id.*

See LANDLORD AND TENANT, 1; REVENUE, 13, 20.

CONTRACTS.

1. *Contracts — Subscription, consideration for — Outlay — Woolen mill, benefit of to public.*— The expense or charge incurred in rebuilding a woolen mill is

CONTRACTS—(*Continued.*)

a sufficient consideration to support a promise to pay the amount pledged for that object by the signer of a subscription paper, without proof of any other or special consideration. (Workman v. Campbell, 46 Mo. 305.) In the rebuilding of an ordinary private establishment this doctrine would not hold. But a woolen mill, especially in the West, is something more than this. In a variety of ways it may be regarded as of benefit to the community at large, and to that extent a public enterprise.—Pitt v. Gentle, 74.

2. *Contract—Board—Agreement meant for gratuity cannot afterward be made a charge—Questions, what, for the jury.*—Where a testator induced one to come and reside with him as one of his own family, with no intention of charging him board, and such was the understanding between the parties at the time, his executors will not be permitted to recover; for that which was originally intended as a gratuity cannot be subsequently turned into a charge. And whether there was any implied contract on which to found an action, or whether the board was intended as a gratuity, are questions of fact for the jury upon the evidence, after taking into consideration the circumstances in life of the parties, the degree of relationship, and all the other facts which may affect the case.—Whaley, Ex'r of Whaley, v. Peak, 80.

3. *Tender—Sale of real estate—Suit for specific performance—When tender need not be made.*—When the vendor of land claims to have rescinded, and repudiates and denies the obligation of the contract, placing himself in such a position that it appears that if tender were made its acceptance would be refused, then no tender need be made by the vendee. In such case it is enough if the latter, in a suit for specific performance, offer by his bill to bring in the money when the amount is liquidated and he has his decree for performance.—Diechmann v. Diechmann, 107.

4. *Bond—Seal—Suit on.*—A bond required by the statute may vary from the statutory requirements and still be a good common-law bond; but there can be neither a statutory nor common-law bond without a seal. And an instrument purporting to be sealed, but without any seal or scrawl, cannot be sued on as a bond. Hence the sureties on an attachment bond, given as required by the landlord and tenant act (Wagn. Stat. 881), will not be liable thereon where the bond is unsealed.—West v. Thompson, 188.

5. *Contracts—Deed—Encumbrances—Parol consideration.*—In an action on a covenant against encumbrances, for amount paid by plaintiff for taxes, defendant may prove that in addition to other considerations named in the deed, plaintiff had made a parol agreement to pay off said taxes.

Although in general all stipulations and declarations anterior to and cotemporaneous with a written agreement are merged in it and cannot be proved by parol, it is further true that additional considerations not inconsistent with those named in a deed may be proved by parol.—Laudman v. Ingram, 212.

6. *Bond—Title—When may be reformed.*—One giving a title bond on the supposition that it embraced certain written agreements, which through fraud or mistake were omitted, will be entitled to have the same reformed.—Schwear v. Haupt, 225.

7. *Agency—Sale of land—Commission—Contract—Different terms.*—A sale of land made by an agent on different terms from those directed by his

CONTRACTS—(*Continued.*)

employer will not bind the latter, although more advantageous than those called for by their contract. But a ratification by the principal of an agreement to sell the land on different terms is equivalent to a prior authority, and the principal will be bound for the amount of commissions agreed upon. And he cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disabling him from performance.—Nesbitt v. Helser, 383.

8. *Specific performance — Partnership — Covenant — Estoppel.* — A. sold out his interest in a partnership with B. to C., on condition that C. should pay the amount of a note from himself to B., and that B. should then surrender to him the note. *Held*, that the note having been paid and C. put in possession in his place, and in all respects treated by B. as partner, the latter could not afterward claim that C. had failed to perform certain acts necessary to consummate the new partnership, and so refuse to deliver the note.—Waterman v. Johnson, 410.

9. *Contracts — Payments — Application of — Mechanics' lien.* — If one owing another on several distinct demands fails to designate on what particular demand a payment is to be credited, the creditor may place it as a payment on any of the demands at his pleasure. Thus, it would be no defense to suit on mechanics' lien that the contractor had paid money enough to plaintiff to satisfy the debt, when it further appeared that the money had been paid on a general account for materials used in erecting various buildings, and that the plaintiff, in the absence of directions from the contractor, had applied the payments to other buildings than that whereon the lien had attached.—Waterman v. Younger, 413.

10. *Bailments — Innkeeper — Contract — Consideration — Lien.*—A., who was an innkeeper, held the baggage of B. to satisfy a board-bill. C., also an innkeeper, agreed with A. to board B. for a certain time in consideration of the promise of A. to retain the baggage as security for the latter's bill. The baggage was released without the payment of the bill. In suit for the amount thereof by C. against A., *held*, that although no benefit might be derived by A. from the agreement, yet the injury received by C. from failure to perform it was a sufficient consideration to support the promise of A.; that the transaction might be considered as in the nature of a voluntary bailment, and of an agreement to enable B. to obtain credit; that in either case the consideration was sufficient; that A. was liable to C. for releasing the baggage. — Hartzell v. Saunders, 433.

11. *Assumpsit — Gambling house, work done upon — Defense to action for.* — It is no defense to an action for work and labor done and material furnished in fitting up a house, that plaintiff knew at the time that the house was to be used for gambling purposes. — Michael v. Bacon, 474.

12. *Practice, civil — Actions — Money paid* — Ignorantia legis.—Where a lessee agreed to pay to the lessor at a future day named, the amount of a certain sewer tax-bill on condition that the latter would pay it in the first instance, the lessee would be liable to the lessor for the amount in an action for money paid, although before suit was brought the bill proved to have been illegal and uncollectible. — Soulard v. Peck, 477.

CONTRACTS—(*Continued.*)

13. *Contracts — Alien enemies, supplies furnished to.*— Parties knowingly furnishing munitions of war to alien enemies cannot demand compensation from the State on the ground that all the formalities of the law have been complied with and a warrant issued for the money. — State ex rel. Blakeman v. Hays, 604.

14. *Governor— Illegal acts under color of law—Liability of the State.*—If the governor, pretending to act in pursuance of the law, should purchase munitions of war for the enemies of the national government, and the vendors should know the object of the purchaser at the time of sale, they would have no claim against the State. — *Id.*

See ASSIGNMENTS; BILLS AND NOTES; BONDS; CONSTITUTION OF THE UNITED STATES, 1, 2; CONVEYANCES; INSURANCE, FIRE; MORTGAGES AND DEEDS OF TRUST; REVENUE, 3; SALES.

CONVEYANCES.

1. *Deed, sheriff's, without certificate of acknowledgment—Defect not remedied by clerk's minutes.*— A sheriff's deed, lacking the indorsement of clerk's certificate of his acknowledgment, cannot be shown in evidence; and the defect cannot be supplied by a transcript from the clerk's entries showing the acknowledgment and its entry upon his minutes.—Adams v. Buchanan, 64.

2. *Conveyances — Acknowledgments — Deputy clerks.*— Deputy clerks acting in the name of the chief clerk have power to take the acknowledgments of deeds and grant certificates thereon.— Springer v. McSpadden, 299.

3. *Conveyance — Seal essential, when.*—Under the act of 1835 (R. S. 1835, p. 142, § 2) the deed of the commissioner therein appointed, "under his proper hand and seal," was made sufficient to convey to the purchaser the title and interest of the county. *Held*, that a seal or scrawl attached to the instrument was necessary in order to pass title. The commissioner acted as a public agent in the execution of a statutory power, and to render his acts as such operative it was necessary that he should have complied with the law.— Harley v. Ramsey, 309.

4. *Deed—What a sufficient sealing.*—The word "seal" at the end of the name of the maker of a deed, and referred to and adopted in the testimonium, is a sufficient sealing.— Groner v. Smith, 318.

5. *Deeds — Acknowledgments of, by justice — County where land does not lie — Effect of — Notice.*— Prior to the act of 1847, an acknowledgment taken before a justice of the peace, in a county where the lands do not lie, is a nullity; and the record of a deed so acknowledged imparts no legal notice. But if the deed was actually put upon record, and if the purchaser saw that record, it would be very strong if not conclusive evidence of actual notice. Notice in such case is a question of fact, and anything tending to prove it is competent evidence.

If, in the neighborhood where the party to be charged with notice resides, the ownership of property is notorious, it is a fact to be considered as tending to show that he was advised of such ownership. — Musick v. Barney, 458.

6. *Evidence — Deeds — Imperfect acknowledgments — Proof — Construction of statute.*—Under the act of 1847 (Wagn. Stat. 595, §§ 35, 36), copies of the

CONVEYANCES—(*Continued.*)
record of instruments drawn theretofore and imperfectly acknowledged can not be received in evidence without satisfactory proof of the execution of the original and the truth of the copy.— *Id.*

7. *Spanish laws — Seal not necessary to pass title.*—Under the Spanish laws a deed was not necessary to convey the legal title. Any instrument showing the intention of the grantor, whether under seal or not, was sufficient. And under that law a parol partition was sufficient even if possession had not been taken under it.— Long v. Stapp, 506.

8. *Conveyances, voluntary — Adverse claims — Notice.*— No notice of adverse claims is required to bind the grantor in a voluntary conveyance of land.— Briggs v. Henderson, 531.

See ASSIGNMENTS; CONTRACTS, 5; DOWER, 1; EQUITY, 5; EVIDENCE, 8; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD, 2; LANDS AND LAND TITLES, 7, 8; MORTGAGES AND DEEDS OF TRUST; REVENUE, 2, 6; SALES; SHERIFFS' SALES; TRUSTS AND TRUSTEES, 2.

CORPORATIONS.

See AGENCY, 5, 6; BILLS AND NOTES, 1, 5, 6; CHILLICOTHE, CITY OF; HANNIBAL, CITY OF; INSURANCE, FIRE; JURY, 1; RAILROADS; REVENUE, 12, 16, 17, 20; ST. LOUIS, CITY OF; STREETS, 4.

COSTS IN CIVIL CASES.

1. *Costs — Re-taxation of — Supreme Court.*— The Supreme Court will in a proper case re-tax excessive costs charged by the clerk of the lower court.— Walden v. Dudley, 419.

2. *Practice, civil — Judgment against plaintiff and surety for costs.*— Where plaintiff gives security for costs, and defendant prevails in the action, judgment may be rendered against plaintiff and his sureties at the same time for costs.— McCartney's Adm'r v. Alderson, 456.

See PRACTICE, CIVIL—APPEAL, 3.

COUNTER-CLAIM.

See PRACTICE, CIVIL—PLEADING, 2, 13, 16, 17, 18.

COUNTIES.

1. *Counties — Boundaries, change of — Transfer of title.*— Counties are capable of holding the title in fee to such lands as may be donated to them for their own use. But the Legislature may alter the boundaries of counties, and, where it does not interfere with the vested rights of individuals, may transfer the title of lands falling in the new county from the old to the new county.—Abernathy v. Dennis, 468.

2. *Limitations — Land held by State, subject to.* — In 1857, land vested either in the State or county was subject to the bar of the statute of limitations.—*Id.*

See COUNTY WARRANTS; COURTS, COUNTY; REVENUE, 8.

COUNTY WARRANTS.

See EXECUTION, 4; REVENUE, 3.

COURTS, CIRCUIT.

See CERTIORARI, 1.

COURTS, COUNTY.

1. *County Court — Justice acting as agent — Agency — Fraud may be proved, how.*— In suit by a county on a bond given the County Court for money

COURTS, COUNTY—(*Continued.*)

loaned, the defense will be a good one which charges that one of the county justices, acting as agent for the county, procured the signature of defendant as surety by fraudulent misrepresentations. If the justice assumed to act as agent, and his acts were approved by the court, such approval is a sufficient ratification of his agency; and his agency and fraudulent conduct may both be shown in evidence.

Where, however, the principal on the bond, without the knowledge of the creditor, procures the signature of the surety by such fraud, the latter will not be released, but must seek his remedy against the principal.—Gasconade County v. Sanders, 192.

2. *County Court — Agency and sub-agency.*—The County Court is the only agent for loaning school moneys, and cannot appoint a sub-agent.

If it could, his agency cannot be shown by parol.—*Id.*, per Bliss, Judge, dissenting.

3. *County Court — School fund — Mortgage — Sale — Powers of County Court — Laches of State officers.*— Certain land was mortgaged to the county of Ray to secure a loan of school funds. The mortgagors also gave their bond with surety to secure the loan. At the mortgage sale the land was bought in by the clerk of the County Court, for a sum equal to the principal and interest of the debt. But the sale was set aside, and the same property was re-sold to the surety for an amount considerably less than that first bid. *Held:*

1. The land could not be bought in by the County Court in the name and for the use of the county. (Wagn. Stat. 1259–61, §§ 78–81, 83, 87–89.) In the care, management and control of the fund the County Court was not the agent of the county, but acted solely under and by virtue of a statutory trust devolved upon it by the Legislature for a particular purpose.

2. The surety was liable for the difference between the sums brought at the first and second sale. The officers of the County Court, in the case supposed, were the agents of the State, and the State was not liable for losses resulting through the acts or neglects of its officers. (Marion County v. Moffet, 15 Mo. 604; Park v. State, 7 Mo. 194.)—Ray County, to use, etc., v. Bentley, 236.

4. *Counties, powers of.*—In the employment of agents, counties have not even the powers conferred on ordinary corporations. They are merely *quasi* corporations, political divisions of the State, and they act in subordination to, and as auxiliary to, the State government.—*Id.*

5. *County Courts — School fund — Mortgage — Security — Sale, etc.*—Where there is danger that real estate, mortgaged to a county to secure the loan of school funds, may decrease in value, it is the duty of the county, if deemed advisable, to demand additional security, and, in case of failure to furnish the same, to order an immediate sale of the property. — *Id.*

6. *Collector—Accounts — Investigation of by County Court—Certiorari—Construction of statute.*—Where a County Court ascertained a balance to be due from the county collector to the county, ordered its payment, and, on his failure to respond, rendered judgment by default against him at the next term, and ordered execution to issue thereon (see Gen. Stat. 1865, p. 228, §§ 19–26), *held:*

COURTS, COUNTY—(*Continued.*)

1st, that the action of the court was judicial and subject to review on *certiorari*.

2d, that the above provisions were not repealed by implication by the act of 1863-4 (Gen. Stat. 1865, p. 130, § 128), providing for a different method of rendering judgment. The former statute is still in force. (Saline County Subscription case, 45 Mo. 52, commented on.)—Owens v. Andrew County Court, 372.

7. *Collector's accounts — What mode of proceeding — Ten per cent. penalty — Examined by County Courts.* — The statutes (Gen. Stat. 1865, p. 228, §§ 19-26) were never intended to clothe County Courts with the general power of overhauling all past accounts of collectors. If a settlement regularly made and approved is to be impeached after the term of court has lapsed, and especially after the collector has gone out of office, it cannot be reached by a proceeding under the statute, but the end must be accomplished by an ordinary action: and in a proper case the courts will correct the error of the agents of the county in approving and recording an improper settlement, by giving judgment against the collector for any amount found to be still due the county, notwithstanding such approval. But in such adjustment the ten per cent. penalty to be added by the collector under the statute (Gen. Stat. 1865, p. 114, § 24) should not be charged against him. — *Id.*

COURTS, PROBATE.

See ADMINISTRATION; WILLS.

CRIMES AND PUNISHMENTS

1. *Trespass — Malicious intent — Statute of 1868 — Evil intent.* — Under the act of 1869, relating to certain malicious trespasses (Sess. Acts 1869, p. 71; Wagn. Stat. 462-3, § 56), the trespass complained of must be willful and malicious. The act has no application where the trespasser acts simply upon a mistaken view of his rights, and not from wantonness or other evil intent. — State v. Newkirk, 84.

2. *Crimes and punishments — Disturbance of peace — Threats — Construction of statute.* — The act of 1870, touching disturbance of the peace (Sess. Acts 1870, p. 45), in general applies to cases where complainant was on his own premises, or in some public place where he had a right to be. It is not designed to punish one for use of violent language and threats which could not result in bodily harm, where the language was used toward an intruder who had before threatened personal injury. — State v. Lunn, 90.

3. *Habeas corpus — Grand larceny — Imprisonment for ten years — Remedy.* — A sentence of ten years' imprisonment on conviction of grand larceny is illegal (Wagn. Stat. 457, § 26), and the prisoner may be discharged under a petition for *habeas corpus* brought to this court. Where the error in the action of the court is one of fact *dehors* the record, this court will not interfere under that form of remedy. But in the case supposed, it appears on the face of the record that the court in passing sentence exceeded its jurisdiction, and did not act by authority of any provision of law. Hence, under the statute (Wagn. Stat. 690, § 35) this court is authorized to interfere. But it has no power simply to reduce the term of imprisonment so as to bring it within the statutory limit. — Ex parte Page, 291.

CRIMES AND PUNISHMENTS—(*Continued.*)

4. *Indictment — Liquor — Selling without license.* — The selling of liquors without license is not an offense subject to be proceeded against by indictment, unless defendant consents to that mode of prosecution. (State v. Huffschmidt, 47 Mo. 73, affirmed.)—State v. Dougher, 409.
5. *Indictment — Selling liquor without license, etc.* — Indictment will not lie for selling whisky without a license, where defendant does not waive his objections to the mode of prosecution. (State v. Huffschmidt, 47 Mo. 73.)—State v. Snider, 409.
6. *Criminal law — Obtaining money under false pretenses — Allegations must show what.* — The essence of the crime of obtaining money or property by false pretenses, is that the false pretense should relate to a past event or to a fact having a present existence, and not to something to happen in the future. And the prosecutor must believe that the pretense is true, and, confiding in its truth, must, by reason of such confidence, part with his money or property. An indictment for obtaining money under false pretenses, which fails to show these facts, is bad, and may be reached by motion in arrest.—State v. Evers, 409. 6 42

See BANKS AND BANKING, 1; PRACTICE, CRIMINAL.

CRIMINAL LAW.

See CRIMES AND PUNISHMENTS; PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Damages — False imprisonment — Sham arrest under legal process — Measure of damages.*—The employees of a railroad company being ordered to remove a section-house belonging to the road, while engaged in its removal were arrested under criminal process for malicious injury to the building, and brought before a magistrate, but were subsequently released; the persons ordering the arrest saying they did not wish to prosecute them further, as they had sued out an injunction restraining the company from removing the building. *Held*, that the proceeding was a sham, and those causing the arrest were liable in damages for false imprisonment; that under the circumstances the damages were aggravated rather than diminished, because the forms of legal process were made use of to accomplish the sham arrest. — Fellows v. Goodman, 62.
2. *Damages — Railroad — Negligence — Selection of employee, care used in — Pleadings.* — A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care is responsible to all other servants for any damage that may arise. But in such case his responsibility is for his own negligence, and not merely for that of his servants. Hence an action against a railroad company for the killing of an employee by a co-employee, which charges that defendant failed to employ skillful servants, but fails to allege want of care and diligence in the selection of servants, is bad on demurrer. If the officers have made careful inquiry into the habits and competency of the employees, and upon such inquiry believe and have reason to believe them sober, competent and careful, they are not liable for the injuries resulting from the negligence of the co-employee.

DAMAGES—(*Continued.*)

And the mere allegation that defendant allowed its employees to neglect their duties, without alleging how or wherein, is not sufficient to charge liability on the company. — Moss v. Pacific R.R. Co., 167.

3. *Railroad companies — Damages — Freight depots — Negligence.* — Under section 5 of the damage act (Wagn. Stat. 520), taken in connection with section 43 of the act concerning railroads (Wagn. Stat. 310-11), railroad companies are not, regardless of the question of negligence, liable for the killing of stock in incorporated towns or cities, near their freight and passenger depots, where goods are wont to be received and shipped, although the track, at the point of the accident, was unfenced. — Lloyd v. Pacific R.R. Co., 199.

See BONDS, 1, 2; DOWER, 6; EVIDENCE, 5; EXECUTION, 3; INJUNCTION, 2; RAILROADS, 6; REPLEVIN, 2; SHERIFF, 7, 8.

DEDICATION TO PUBLIC USE.

See EMINENT DOMAIN; HANNIBAL, CITY OF, 1, 2, 3; LANDS AND LAND TITLES, 3, 4; RAILROADS, 1, 2, 3, 7; ST. CHARLES, CITY OF, 1, 3; STREETS, 1.

DESCRIPTIO PERSONÆ.

See BILLS AND NOTES, 1, 5, 6.

DESCRIPTION.

See LANDS AND LAND TITLES, 1.

DISTURBANCE OF THE PEACE.

See CRIMES AND PUNISHMENTS, 2.

DIVORCE AND ALIMONY.

1. *Divorce — Alimony — Counsel fees — Dismissal of suit.* — Under a proper construction of the act of 1868, touching alimony (Wagn. Stat. 535, § 12), in a suit for divorce by the husband against the wife, the latter is entitled to the allowance of a reasonable sum for defending the suit; and this sum should be large enough to cover counsel fees. But they should not be entered up as specific costs; she must make her own terms and pay the amount from the general fund. The sum may be increased if necessary as the suit progresses, and the allowance may be enforced by attachment, or the court may make its payment a condition to the further prosecution of the suit. And the dismissal of the suit by plaintiff while the application for alimony is under consideration by the court, will not defeat the claim, although it may diminish its amount.—Waters v. Waters, 385.

DONATIONS.

See GIFTS: ST. LOUIS, CITY OF, 1.

DOWER.

1. *Dower—Land, part payment for by vendee—Sale of after death of vendee—Assignment of dower to widow — Rule as to.*—Where the vendee of land has taken possession and paid part of the purchase-money, although no deed has passed but merely a title bond, he has such an interest therein as will make his vendor stand seized to his use; and after his death and sale of the property by the administrator, his widow will be entitled to her dower in the land, subject, perhaps, to contribution of her proportion of the amount paid by the administrator's vendee in satisfaction of the original vendor's lien.—Hart v. Logan, 47.

DOWER—(*Continued.*)

2. *Dower — Equitable estate — Purchase-money not fully paid — No dower attaches, when.*—Where the purchase-money on a title bond for land was not fully paid, and the equitable interest of the husband in the land was sold prior to his death, his widow can have no dower therein. As the equity of the husband was not such as would entitle him to a decree for the legal estate, there was no resulting trust in his favor, and the vendor was not seized to his use, within the meaning of the first section of the dower act.—Worsham v. Callison, 206.
3. *Dower properly real estate.* — The term "dower" properly refers to the interest of the widow in the real estate of the deceased.— Bryant, Adm'r of Buford, v. McCune, 546.
4. *Dower — Household furniture, etc, not dower estate — Construction of statute.* — The household furniture, provisions, etc., allowed the widow by statute (Wagn. Stat. 88, § 33), are no part of her dower proper. She has an absolute property, and not a life estate, in them.— *Id.*
5. *Dower — Devise in will not taken in lieu of by implication.* — A devise or bequest in favor of the wife, contained in the will of the husband, will never be construed by implication to be in lieu of dower. The design to substitute the one for the other must be unequivocally expressed.— *Id.*
6. *Dower, action for deforcement of — Mode of estimating damages — Yearly value if the land had been properly improved, etc.*— In assessing the damages due a widow for the detention of her dower, it is the duty of the jury to find from the evidence in the cause what would have been the reasonable net yearly value of the land without reference to any improvements, after deducting the taxes, if the land had been reasonably used by the owner, and to allow plaintiff one-third of the net sum. This rule imposes on the owner of the land the duty of making it reasonably productive, so that the widow shall obtain her proportionate share, if any is due her, by fair management. It matters not whether the property has been actually used. The true criterion is, what would be the yearly value of the land if the property had been reasonably used by the party in possession holding the title.— O'Flaherty v. Sutton, 583.

E

EJECTMENT

1. *Ejectment — Execution sale — Outstanding title.*— Defendant in an execution cannot defeat an action of ejectment brought against him by a purchaser at the execution sale, by setting up an outstanding title. And the same rule obtains in case of one claiming under such title, where he had acquired possession under defendant in the execution. If he wishes to assert his title he must first yield his possession so acquired from defendant in the execution, and then bring his action of ejectment.— Boyd v. Jones, 202.
2. *Ejectment — Irregularities in proceedings affecting title may be investigated, when.*— In an ejectment suit, irregularities in the entry of a judgment or issue of an execution or mode of advertisement thereunder, in proceedings through which the parties to the ejectment suit derived title, but to which they were strangers, cannot be shown in evidence. Those errors are such as could only be looked into in a direct proceeding instituted for that purpose.— Winston v. Affalter, 263.

EJECTMENT—(*Continued.*)

3. *Ejectment — Plaintiff must stand on his own title.*— In ejectment, plaintiff must stand on his own title, and if he has none he cannot recover against the party holding the possession.— Large v. Fisher, 307.

4. *Ejectment — Trespasser.*— In an action of ejectment, a mere trespasser can not raise the question of notice as between other parties.— Strain v. Murphy, 337.

5. *Ejectment — Evidence — Common grantor — Notice, actual and constructive.* —In ejectment, proof of a written contract with plaintiff for conveyance of the land from one in possession claiming title, which was subsequently executed by a statutory process (see Wagn. Stat. 99, §§ 38, 43), is sufficient *prima facie* evidence against one claiming under the same grantor, by deed intervening between the contract and its specific execution. The title of the common grantor is acknowledged, and plaintiff need go no further. To prevail against plaintiff's case it must appear that defendant purchased for a valuable consideration without notice of the original contract with plaintiff. And in such case, where the contract was recorded and it appeared that the opposite party was a dealer in real estate, although the record would not be constructive notice, yet this fact might go to the jury in connection with others as tending to show actual notice.— Fellows v. Wise, 350.

6. *Mortgage — Condition broken — Ejectment.*—The mortgagee, after condition broken, may maintain ejectment for the mortgaged land.— Reddick v. Gressman, 389.

7. *Ejectment — Inconsistent defenses.*— In ejectment, defendant cannot deny the title of the grantor of plaintiff, and yet claim as purchaser under his grantor. Such defenses are inconsistent, and, when entering upon his proof, defendant may be compelled to elect between them.— Fugate v. Pierce, 441.

See ATTACHMENT, 3; LANDS AND LAND TITLES, 29; SALES, 7.

ELECT, MOTION TO.

See PRACTICE, CIVIL — PLEADING, 5, 15.

EMINENT DOMAIN.

1. *Eminent domain — Railroads — Statute — What uses public.*—The Hannibal & St. Josepn R.R. Co. are authorized under the statute (Wagn. Stat. 298, § 2, subd. 7) and charter (§ 5), to condemn land for purposes of depots, engine-houses and repair-shops. Such use is a public use, for which property may be taken against the owner's consent.— Hann. & St. Jo. R.R. Co. v. Muder, 165.

2. *Eminent domain — Country roads crossing railroads — General grant.*— Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of its organization, cannot be inferred from the general grant of power to establish a road across its track, but such general grant is sufficient to warrant the laying of a road across its track whenever public necessity demands it; and as to whether that public necessity exists, the city council must be the judge.— City of Hannibal v. Hannibal & St. Jo. R.R. Co., 480.

3. *Eminent domain — Bridge approaches — Appraisement of land — Verdict of commissioners may be set aside by Circuit Court.*— The finding of commissioners appointed to appraise land to be condemned for approaches to a bridge, is not conclusive upon the Circuit Court; but on written exceptions,

EMINENT DOMAIN—(*Continued.*)

filed by either party, the court may re-examine the evidence, and, if the verdict of the commissioners was wrong, may set it aside. (Wagn. Stat. 828, § 4.)—Hannibal Bridge Co. v. Schaubacker, 555.

See LANDS AND LAND TITLES, 3; RAILROADS, 1, 3, 7.

ENTRIES.

See EVIDENCE, 15.

EQUITY.

1. *Equity — Decree, when may be set aside.— Semble*, that after a lapse of three years, a decree of court cannot be set aside on motion.— Richardson v. Richardson, 29.

2. *Sale — False representations avoid, when.*— In order to avoid a sale for that reason, the representation touching the subject-matter of the sale must not only be false, but the purchaser must be deceived by it. He must trust to it and buy on the strength of it. Thus, where the vendee examined land prior to purchase, he could not afterward have the sale set aside because the vendor had falsely represented the land to be wooded and smooth in surface; since as to these facts there could have been no deception.— Morse v. Rathburn, 91.

3. *Sale of land — Agency — Sub-agent, representations by.*— Where one who acts for the legal owner of land is himself the equitable owner, the representations of his agents will bind the legal owner. In such case the equitable owner is also principal.— *Id.*

4. *Equity — Trespass* — Ex parte *estate — Vendor's lien — Petition* — Certain separate estate was owned by a married woman, subject to the vendor's lien. Part of it was subjected to payment of her debts by a judgment, definitely describing the same. A bill being brought by the purchaser thereof at execution sale, to subject her remaining estate to the payment of the vendor's lien, on the ground that the original suit by mistake failed to embrace these lands, *held*, that the bill contained no equity, and was properly dismissed; for the proceedings under which he purchased gave him no title to said lands, and no attempt was made by suit for that purpose to reform those proceedings.— McCann v. White, 96.

5. *Equity — Bill in to set aside deed — Fraud — Encumbrance — Warranty.*— In case of a bill in equity to set aside a deed from plaintiff to defendant as being obtained by fraud, where it appears that the land was conveyed in exchange for other real estate deeded by defendant to plaintiff, which at the time was subject to an encumbrance, but the evidence showed no knowledge of the encumbrance on the part of defendant and no fraud in the transaction, plaintiff might be entitled to his action on defendant's covenant of warranty for the amount he paid to remove the encumbrance, but he could ask for nothing more.— Eddington v. Nix, 134.

6. *Practice, civil — Jury not a matter of right in chancery cases.*— A suit alleging the cancellation and delivery of a note by mistake, and asking for relief, and that defendant be decreed to pay, etc., may properly be treated by the court as a bill in equity; and defendant therein is not entitled to a jury as a matter of right. Issues may be framed and submitted to a jury, but that is a matter of discretion and not of absolute right.— Weil v. Kume, 158.

7. *Equity — Partition sale of lands under — Person having interest not a party — Action to set judgment aside, etc.*— One claiming an interest in lands sold

EQUITY—(*Continued.*)
in a partition suit, to which he was not a party and by which he was not bound, is not entitled to a decree in a court of equity setting the proceedings aside on the ground that the same were fraudulent and void.—Peak v. Laughlin, 162.

8. *Equity — Relief — Purchaser without consideration given — Notice.*—A grantee of land must show that he has paid the purchase-money or parted with some valuable consideration, before he can be entitled to relief against an outstanding title on account of failure of notice thereof.—Rice v. Bunce, Adm'r of Seely, 231.

9. *Equity — Trust estate — Notice.*—One who, in consequence of a blunder in the terms of a deed, obtains the legal title to land the equitable ownership of which is in another, and has full knowledge of the fact, will hold as trustee for the latter. And a grantee, with notice from the legal owner, will be affected with the same trust.—Smith v. Walser, 250.

10. *Sales—Agreement to bid on for debtor, etc.—Specific enforcement.*—Where the purchaser at a sheriff's sale agreed with defendant in the execution that he would bid it off for him and give him a title bond to re-convey it to him as soon as the amount bid for it was refunded, and purchasers were prevented from bidding by acts and declarations creating the impression that the purchaser was bidding in the property for defendant in the execution, such agreement should be specifically enforced in a court of equity.—Griffith v. Judge, 536.

11. *Equity, bill in — Equitable garnishment.*—Where a debtor has absconded so that judgment cannot be obtained against him, and has no property in the State subject to attachment, but has money in a city treasury belonging to him, it may be reached by bill in equity, in the first instance, without a previous judgment at law, and without showing fraud or any other recognized ground of equitable jurisdiction. And the fact that cities are not liable under the statutory garnishment, will not protect them from such proceeding in equity.—Pendleton v. Perkins, 565.

See CONTRACTS, 6; DOWER, 2; INJUNCTION, 1; LANDLORD AND TENANT, 3; PRACTICE, CIVIL — PLEADING, 11, 12; TRUSTS AND TRUSTEES, 3.

ESCROW.

See BILLS AND NOTES, 2.

ESTOPPEL.

1. *Estoppel* in pais — *Boundary line — Improvement, acquiescence in.*—Without any agreement more than is implied from their acts, if two persons trace their dividing line, and both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterward alleging such mistake as shall deprive the builder of his improvements; and especially if the party seeking to disturb the line knew at the time the improvements were made, all that he subsequently learned, or if he had the means of knowledge. In such case it is not necessary to show actual fraud in the party estopped.—Dolde v. Vodicka, 98.

2. *Estoppel* in pais — *Sale of lands — Improvements, etc.*—One who has received an adequate consideration for the sale of land, and stands by for years and sees it greatly enhanced in value by improvements, without warning

ESTOPPEL—(*Continued.*)
or protest, is estopped from disavowing the sale, although the sale itself was not binding in law.— Highley v. Barron, 103.

8. *Real estate — Mistaken boundary line — True line must govern, when — Adverse possession.*— If two adjoining proprietors are divided by a line which they suppose to be the true one, each claiming only to the true line wherever it may be, they are not bound by such supposed line, but must conform to the true one when it is ascertained. But if these proprietors fix upon certain monuments or clearly-defined mark of their division line, and each holds open, notorious and continued possession to such line, claiming it to be the true one; or if one holds such possession up to such boundary, claiming it to be the true line, and the other party acquiesces or fails to take steps to disturb his possession, it is adverse, and the statute of limitation will apply.

In the absence of intention to hold adversely, however, the presumption will be that he designed to hold only to the true line, whatever that might be. —Tamm v. Kellogg, 118.

4. *State bonds — Governor, authority of to contract for payment in specie.*— The State by the course of its Legislature is estopped from now disputing the authority of the governor to contract for the payment of State bonds in gold and silver.— Opinion in response to Governor, 216.

5. *Estoppel* in pais — *Sale of land — Standing by — Silence and encouragement.*— One having an equitable interest in land, who is present when the same is put up for sale, and gives no notice of his own claim, but enters the list of bidders, and by his silence or conduct induces others to bid and expend their money in the purchase of the land, will be estopped from afterward asserting his title against the purchaser.— Rice v. Bunce, Adm'r of Seely, 231.

6. *Estoppel* in pais — *Fraudulent intent not necessary.*— If a person encourages another to purchase either land or a chattel, he cannot afterward assert any title in himself to the thing purchased, although he may have been ignorant of his rights when he gave the encouragement; for though there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, in the same manner as if there had been a fraudulent purpose.— *Id.*

7. *Partition — Sale — Fraud — Reversal of proceedings — Estoppel.*— Parties in interest in a partition suit, who receive their land at the partition sale, make no complaint of any unequal distribution, and permit the purchasers to make valuable improvements, and show no fraud or mistake in the proceedings, will be estopped from afterward taking advantage of an irregularity in the order of sale, and having them reversed and a new partition ordered. *A fortiori* would an outsider champertously purchasing, for purposes of speculation, the interest of a party to the original suit who was not disposed to litigate, be forbidden thus to annul the sale.— Pockman v. Meatt, 345.

See ATTACHMENT, 5; PARTNERSHIP, 1.

EVIDENCE.

1. *Evidence — Bond — Testimony touching, at date of.*— In suit on a bond, statements of the principal at the date of its execution, in the absence of plaintiff or his agent, are inadmissible.— North Mo. R.R. Co. v. Wheatley, 136.

2. *Witnesses — Where party is dead, children of other party may testify.*— Where one of the parties to a contract or cause of action is dead, the statute

EVIDENCE—(*Continued.*)
excludes the other party in interest from testifying, but not his children.—Anderson, Adm'r of Gentry, v. Hance, 159.

3. *Promissory notes—Execution—Denial of, may be sworn to, when.*—Where defendant in a suit on a promissory note was no party to the instrument, but through mere inadvertence failed to verify his denial of its execution (Wagn. Stat. 1046, § 45), he should be permitted on suitable terms to make the affidavit.— *Id.*

4. *Evidence — Experts, testimony of.*—Where the experience of a witness is of such a nature that it may be presumed to be within that of all men of common education moving within the ordinary walks of life, the evidence of opinion is improper. The jury must draw their own inference.—Gavisk v. Pacific R.R. Co., 274.

5. *Damages — Railroad — Evidence — Offer of charity.*—In suit for damages against a railroad company for killing plaintiff's husband, proof of a letter from the president to plaintiff, containing an offer of money as a charitable donation, but in no way admitting any legal liability, although strictly improper for irrelevancy, would not be calculated to work harm to defendant, and would not justify a reversal of the cause.— *Id.*

6. *Partnership — Admissions of members.*—The admissions and declarations of one of the partners touching a partnership transaction bind the remaining members of the firm.—Henslee v. Cannefax, 295.

7. *Deed—Record.*—A deed is not inadmissible in evidence because unrecorded.—Shumate v. Reavis, 333.

8. *Evidence, secondary — Contents of deed.*—Before being permitted to introduce the record copy of a deed, the person so desiring must account for the non-production of the original by showing that it is not within his power. This will be sufficiently established by proving that the custodian of the deed has made diligent search for it and cannot find it.—Strain v. Murphy, 337.

9. *Ejectment — Evidence — Common grantor—Notice, actual and constructive.*—In ejectment, proof of a written contract with plaintiff for conveyance of the land from one in possession claiming title, which was subsequently executed by a statutory process (see Wagn. Stat. 99, §§ 38, 43), is sufficient *prima facie* evidence against one claiming under the same grantor, by deed intervening between the contract and its specific execution. The title of the common grantor is acknowledged, and plaintiff need go no further. To prevail against plaintiff's case it must appear that defendant purchased for a valuable consideration without notice of the original contract with plaintiff. And in such case, where the contract was recorded and it appeared that the opposite party was a dealer in real estate, although the record would not be constructive notice, yet this fact might go to the jury in connection with others as tending to show actual notice.—Fellows v. Wise, 350.

10. *Wills, probate of. — What proof necessary to make will competent as evidence.*—In order that a will may be received in evidence, there should be some proof in writing attached to the will and recorded with it, showing that it had been duly proved. And there should be a certificate of the record of the will and proof. But the statute does not require that the proof should consist of the actual testimony in detail taken at the probate, signed by the witnesses and attested by the clerk; nor that the certificate of the clerk attached should show that it was so signed and attested. The certificate spoken

EVIDENCE—(*Continued.*)

of in section 20, and that in section 26 of the statute touching wills (Wagn. Stat. 1367) cannot be the same. The former is in the nature of a *jurat* to an affidavit showing that the testimony was given and subscribed in open court and before the clerk: while the latter is a certificate to the action of the court. —Charlton v. Brown, 353.

11. *Evidence — Deeds — Imperfect acknowledgments — Proof — Construction of statute.*—Under the act of 1847 (Wagn. Stat. 595, §§ 35, 36) copies of the record of instruments drawn theretofore and imperfectly acknowledged can not be received in evidence without satisfactory proof of the execution of the original and the truth of the copy.— Musick v. Barney, 458.

12. *Witnesses — Testimony, contradictory — Disregarded, when.*—If a witness contradict himself on any material point, his testimony may be disregarded. —State v. Miller, 505.

13. *Evidence* — Qui tacet, *etc.* — Statements made in the presence of a party sought to be bound by them, and not denied, are competent evidence against him.— *Id.*

14. *Instrument, lost — Execution, proof of—Evidence, primary and secondary —What permissible.*—The establishment of the loss of an instrument will not dispense with the necessity of proving its execution. And the best evidence of this fact which the case will admit of must be produced. But on the failure of better proof, secondary evidence, down to its lowest stages, is admissible. Thus, the copy of the record of a deed proved to be lost may be introduced, the recorder having sworn to his recollection of the original deed and to the fact that the record and copy were faithful transcripts of the original.—Briggs v. Henderson, 531.

15. *Evidence —Instruments, copies of—Entries, cotemporaneous.*—Cotemporaneous entries, not only of acts and occurrences, but of copies of instruments, if made in the course of business, or where they would naturally be looked for, are often received, especially when sustained by other evidence.—*Id.*

See Bills and Notes, 2, 4; Contracts, 5; Conveyances, 5; Forcible Entry and Detainer, 1, 2, 3; Insurance, Fire, 1; Lands and Land Titles, 10, 15, 25, 26; Practice, Civil—Appeals, 4; Practice, Civil —Trials, 2, 4, 5; Practice, Criminal, 6, 15; Practice, Supreme Court, 1, 2, 5, 6, 7; References, 1, 2; Revenue, 5, 7; Sureties, 1; Witnesses.

EXECUTION.

1. *Sheriff — Execution — Bond, action on — Measure of liability.*—A sheriff is bound to use reasonable diligence in searching for property on which to levy. It is usual for the plaintiff to point out property where it is not known to the officer; but if it were pointed out by another, or if the officer had knowledge of such property, no matter how obtained, and failed to make a levy, it would be sufficient to establish his liability on his bond. But his liability does not follow from the mere fact that there was property in possession of defendant not levied on, without proof that he knew of the property or might have ascertained about it by the exercise of reasonable diligence.—State, to use of Lowe, v. Ownby, 71.

2. *Sheriff — Bond, suit on — Default — What allegation may be inquired into after.*—In suit on a sheriff's bond for failure to levy upon property sufficient to satisfy an execution, the truth of the allegation that the sheriff had notice

EXECUTION—(*Continued.*)

of the execution-defendant's having property subject to execution, is not admitted by a default taken in the case; but, under the statute (Wagn. Stat. 240, § 7), must be inquired into. Proof of the existence of such property, and consequently of his knowledge thereof, pertains to the condition and breach, not to the penalty or the execution of the bond.—*Id.*

3. *Execution, special, what—Failure to levy—Damages.*—An execution in proceedings to foreclose a mortgage, recited an order to levy on the "mortgaged premises," and then definitely described them by metes and bounds. The order, as recited, also directed that if the premises were insufficient to satisfy the execution, then the residue should be levied of the goods, chattels, lands and tenements of the debtors, without specifying particularly what should be taken. The execution then directed that of the goods, lands, etc., "as above described," the officer should cause to be made the debt, damages and costs. Apart from its recitals, the execution contained no direct command to seize any other property than that spoken of as "above described," viz: the mortgaged premises. *Held*, that the order, being to seize accurately-described specific property, was a special execution.

Under that execution the officer was bound to take and sell the mortgaged premises; and if plaintiff in the execution were injured by reason of his neglect to do so, the creditor should be compensated in damages, unless he interfered and gave instructions at variance with the requirements of the execution.—State, to use of Ross, v. Cave, 129.

4. *Executions—County warrant—Receipt by sheriff, effect of.*—A county warrant is capable of being seized and levied on by a sheriff (R. C. 1855, p. 741, § 18; Wagn. Stat. 606, § 20), and his receipt thereof, in satisfaction of an execution, is in law a satisfaction of the execution and of the judgment on which it is issued; and if any loss results to the creditor in consequence of the act of the sheriff, his recourse would be on that officer and his official sureties.—Trigg v. Harris, 176.

5. *Sales cannot be impeached collaterally in ejectment.*—Where a stranger purchases lands at an execution sale, it can be impeached only by a direct proceeding, by motion to set aside the sale, or, where a deed has been made, by an action in the nature of a bill in chancery. It cannot be done in an action in ejectment.—Groner v. Smith, 318.

6. *Judgment—Sheriff's deed—Sale—Revival of judgment—Execution, issue of.*—An execution may be issued upon a judgment, the record of which had been mutilated or destroyed, without waiting to have it re-entered as provided by the act of 1864 (Sess. Acts 1863–4, pp. 44–5).—Strain v. Murphy, 337.

See AGENCY, 2; ATTACHMENT, 4; EJECTMENT, 1; GARNISHMENT; HUSBAND AND WIFE, 2; JUDGMENT, 2; REVENUE, 23.

EXPERT.

See EVIDENCE, 4.

F

FALSE IMPRISONMENT.

See DAMAGES, 1.

FALSE PRETENSES.

See CRIMES AND PUNISHMENTS, 6.

FENCES.

See RAILROADS, 6.

FORCIBLE ENTRY AND DETAINER.

1. *Forcible entry and detainer*— Indicia *of actual possession*— *What sufficient.* —In an action of forcible entry and detainer it appeared that plaintiff, in entering upon land, caused it to be surveyed, established the corners, cut hay upon the land and ricked it up, and forbade others to cut hay upon it; *held*, that such acts amounted to open and visible *indicia* of possession, from which the jury might deduce actual possession and find for plaintiff.— Miller v. Northrup, 397.

2. *Forcible entry and detainer — Proof of possession — What sufficient.* —In actions under the statute for forcible entry and detainer, proof of title in the plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession. But plaintiff need not be always on the land, provided the occupation by the owner is intended to be permanent.— *Id.*

3. *Forcible entry — Possession — Wild lands* —There may be possession in fact of unimproved and uncultivated land. An entry upon land, with the intention of clearing and fitting it up for cultivation, is such an entry as that a jury may be authorized to infer actual possession from it.— *Id.*

4. *Forcible entry and detainer —Tenant, when in possession, must sue.*— For disseizin during tenancy, where the tenant was in actual possession, an action of forcible entry and detainer should be brought by him, and not by the landlord.— McCartney's Adm'r v. Alderson, 456.

FRAUD.

1. *Land and land titles — Fraudulent misrepresentations — Diligence — Confidence — Proof of fraud, etc.*— Fraudulent misrepresentations and concealment by the vendor of land as to the nature, quality, quantity, situation and title thereof, in order to entitle the vendee to relief, must be in reference to some material thing unknown to the vendee either from want of examination or from want of opportunity to be informed. And if the buyer trusts to representations which are not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily in his reach, he must suffer the consequences of his own folly and credulity. The vendee must go further and show that some deceit was practiced for the purpose of putting him off his guard, or that special confidence was reposed in the representations of the vendor, and that the contract was made and entered into upon the strength of that confidence. And in such cases there should be the clearest proof of the fraudulent misrepresentations.— Langdon v. Green, 363.

See ADMINISTRATION, 1, 2; AGENCY, 3; ASSIGNMENT, 2; CONTRACTS, 6; ESTOPPEL, 5, 6; FRAUDULENT CONVEYANCES; GIFTS, 1; PARTITION.

FRAUDS, STATUTE OF.

See LANDS AND LAND TITLES, 3.

FRAUDULENT CONVEYANCES.

1. *Agency — Deed of trust — Fraud* — Res gestæ.— The grantor in a chattel deed of trust remained in possession, and failed to have it recorded within the proper time, but requested the recorder to file it for record and return it, saying that there was some trouble about the property and he might wish to alter it. The property being attached in the hands of the grantor, on the claim that the deed was fraudulent, and being replevied by the grantee, the

FRAUDULENT CONVEYANCES—(*Continued.*)

former would be held to have acted as agent of the latter in the transaction with the recorder, and his statements would bind the grantee, in the absence of any proof that the grantor was wrongfully in possession of the property, or that the grantee repudiated his transaction with the recorder.—Haenschen v. Luchtemeyer, 51.

2. *Sales, fraudulent—Gross inadequacy of price—Fraudulent circumstances.*—When a sale is attacked as fraudulent, gross inadequacy of price is one of the badges of fraud, and becomes controlling when coupled with other circumstances tending to show fraud.—Curd v. Lackland, 451.

G

GAMBLING HOUSES.

See CONTRACTS, 11.

GARNISHMENT.

1. *Equity, bill in—Equitable garnishment.*—Where a debtor has absconded so that judgment cannot be obtained against him, and has no property in the State subject to attachment, but has money in a city treasury belonging to him, it may be reached by bill in equity, in the first instance, without a previous judgment at law, and without showing fraud or any other recognized ground of equitable jurisdiction. And the fact that cities are not liable under the statutory garnishment, will not protect them from such proceeding in equity.—Pendleton v. Perkins, 565.

GIFTS.

1. *Undue influence—Donations to persons in relation of trust, etc.*—Donations to persons sustaining the relation of confidential friend and adviser of the donor, will be watched with great jealousy, and will be set aside on the discovery of the least fraud. Every presumption will be against them.—Yosti v. Laughran, 594.

GOVERNOR.

1. *Governor—Illegal acts under color of law—Liability of the State.*—If the governor, pretending to act in pursuance of the law, should purchase munitions of war for the enemies of the national government, and the vendors should know the object of the purchaser at the time of sale, they would have no claim against the State.—State ex rel. Blakeman v. Hays, 604.

See CONSTITUTION OF MISSOURI, 3.

GUARDIAN AND WARD.

1. *Wills—Life estate—Survivorship—Guardianship.*—By the terms of a will, testator's daughter was to take the care of two brothers during their lives, and "in so doing" was to have the use and benefit of the personal property of the testator, and to have the possession of his land for the care and support of herself and children and her brothers. A special guardian was appointed for the latter. *Held*, that under the will, in the absence of any further provision, her death having occurred before that of her brothers, her husband could not succeed to her position in the control of the property and the care of her surviving brothers. No title vested in her as trustee, and there was no trusteeship into which her husband could enter, either under the will or by virtue of a judicial appointment.

GAURDIAN AND WARD—(*Continued.*)

And no estate vested in her children. Their interest was through the mother, and was dependent upon her fulfilling the terms of the will in respect to the care and support of her brothers.— Richardson v. Richardson, 29.

2. *Guardian — Ward's estate — Sale — Lease.*—A guardian has no power, without judicial sanction, to sell his ward's estate, but he may lease it. And a contract made by a guardian, by which the other party thereto should continue in possession of land belonging to the ward, on the condition of paying annually a contingent sum, to be fixed by a commissioner, for the support of the ward, might be upheld as a lease without the aid of court.— *Id.*

3. *Bond, guardian's — Suit on — Contribution—Petition—Allegations — Verdict — Jeofails — Record — Surplusage.* — Where judgment was obtained against a surety on a guardian's bond, and the surety sued his co-surety for contribution, the failure of his petition to state that the original suit was brought in the name of the State, to the use of the beneficiaries on the guardian's bond, should not be held to vitiate his judgment. The error would be cured by verdict. And on the trial, notwithstanding such defective averment, the record in the former suit might be admitted in evidence. And no mere informalities, not sufficient to have invalidated the first judgment, ought to be considered. Nor could the record be rendered inadmissible in evidence from the fact that it embraced a copy of the guardian's bond. The latter was no part of the record, and should be treated as surplusage.— Haygood v. McKoon, 77.

4. *Guardian — Parent acting as curator—Duties of as such.*—Where a minor has property independent of his parents, security must be given by the parent, and accounting be had in the same manner as though a stranger were appointed.—Duncan v. Crook, 116.

5. *Guardian — Curator — Sale of ward's property — Education.* —The curator of the estate of the ward, and not the guardian of his person, is the proper individual to apply for the sale of the ward's estate, and to sell the same and receive the proceeds for the expenses of his education.—*Id.*

H

HABEAS CORPUS.

1. *Habeas corpus — Grand larceny — Imprisonment for ten years — Remedy.* — A sentence of ten years' imprisonment on conviction of grand larceny is illegal (Wagn. Stat. 457, § 26), and the prisoner may be discharged under a petition for *habeas corpus* brought to this court. Where the error in the action of the court is one of fact *dehors* the record, this court will not interfere under that form of remedy. But in the case supposed, it appears on the face of the record that the court in passing sentence exceeded its jurisdiction, and did not act by authority of any provision of law. Hence, under the statute (Wagn. Stat. 690, § 35), this court is authorized to interfere. But it has no power simply to reduce the term of imprisonment so as to bring it within the statutory limit.— Ex parte Page, 291.

HANNIBAL, CITY OF.

1. *Cities — Hannibal — Establishment of streets — Charter.*—The power to open streets, as given in the charter of the city of Hannibal, includes the power to establish streets.— City of Hannibal v. Hann. & St. Jo. R.R., 480.

HANNIBAL, CITY OF—(*Continued.*)

2. *Hannibal, charter of — Proceedings for condemnation of streets — Petition of property-holders.*—No petition by the property-holders is required by the charter of the city of Hannibal, in order to authorize proceedings for the establishment of streets in that city.— *Id.*

3. *Streets, establishment of — Hannibal city council — Jurisdiction over.*— In proceedings for establishment of streets in the city of Hannibal, the city council of that city alone has jurisdiction.— *Id.*

HANNIBAL & ST. JOSEPH RAILROAD CO.

See RAILROADS, 1, 7.

HUSBAND AND WIFE.

1. *Married women — Contracts of, void.*— The promise and undertaking of a married woman, as a contract, are entirely void, and she cannot be held personally liable therefor.— Higgins v. Peltzer, 152.

2. *Married women, judgment against — Execution, sales under.*—A judgment at law against a married woman is void, and an execution sale under it will convey no title.— *Id.*

3. *Judgment, impeachment of collaterally — Married women.*— The principle that a party cannot impeach a judgment in a collateral proceeding, does not apply to the case where defendant is a *feme covert* and not *sui juris.*— *Id.*

4. *Husband and wife — Married women — Property of exempt from execution against husband, when.*— Land purchased by the wife out of her own separate estate, even though that estate be money, is exempt from execution against her husband for his own debts.— Hale v. Coe, 181.

See DIVORCE AND ALIMONY; DOWER; WITNESSES, 2.

I

INDICTMENT.

See PRACTICE, CRIMINAL.

INFANTS.

1. *Minors — Affirmance of contracts — Property, recovery back — Refunding of money.*— Infants, after they become of age, may affirm contracts not previously binding on them. Any act done by them showing an intention to affirm, such as receiving the purchase-money, with a full knowledge of all the facts, will be sufficient. And where an infant seeks to recover back his property, either real or personal, he must refund what he has received. He cannot recover so long as any part of the consideration is withheld.— Highley v. Barron, 103.

See GUARDIAN AND WARD.

INJUNCTION.

1. *Equity — Injunction — Allegation of insolvency, etc.*—An injunction is not the proper remedy to prevent the wrongful sale of land, where there is no allegation of insolvency or other matter bringing the case within some exclusive branch of equity jurisdiction.— Waterman v. Johnson, 410.

2. *Injunction will not lie for past injuries.*—For past injuries or trespasses the only remedy is by an action at law for compensation in damages. In such case injunction furnishes no relief. It is resorted to and applied only where an

INJUNCTION—(*Continued.*)

injury to real or personal property is threatened: and to prevent the doing of a legal wrong when an adequate remedy cannot be afforded by an action for damages.—Owen v. Ford, 436.

INNKEEPER.

See CONTRACTS, 10.

INSTRUCTIONS.

See PRACTICE, CIVIL—TRIALS, 2, 6, 7; PRACTICE, CRIMINAL, 7; REPLEVIN, 1.

INSURANCE, FIRE.

1. *Fire insurance — Premium notes — Resolution of directors — Assessment — Proof of losses.*—In a suit brought by a mutual fire insurance company for the amount of an assessment upon a premium note, proof of a resolution of plaintiff's board of directors levying an assessment on premium notes to meet the indebtedness of the company, is insufficient to establish the liability of defendant, without further proof that the losses and expenses which authorized the assessment had actually occurred.—Pacific Mut. Ins. Co. v. Guse, 329.
2. *Insurance companies—Draft—Agency.*—Where the by-laws of an insurance company gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and it appears that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, which drafts were honored and paid off, the community and those who dealt with him had a right to presume that authority had been delegated to him for that purpose, and the company would be bound for the payment of such drafts.—Fayles v. National Ins. Co. of Hannibal, 380.
3. *Insurance — Consignee, insurance by — Insurable interest of, in goods forwarded — Instructions from consignor to insure.*—A merchant to whom goods are consigned for sale on commission, with instructions from his principal to insure for his benefit, is bound to obey the instructions or indemnify the consignor against any losses. And although usually he has no insurable interest in the goods further than the amount of his probable commissions or profits, yet, in case of such instructions, he may protect himself against losses by insuring the whole property consigned; and to this end he should be considered as insured for the full value of the property, and would be entitled to recover of the insurance company in case of loss. In such case the policy ought to inure to the benefit of the principal; and the agent or consignee ought to be treated as a trustee for the consignor, and the amount of the recovery should go to the principal. And in a suit upon the policy, in the name of the consignee, this may be shown in order to prove that he had an insurable interest as trustee for his consignor.—Shaw v. Ætna Ins. Co., 578.

INSURANCE, LIFE.

See REVENUE, 16.

INTEREST.

See ADMINISTRATION, 2.

J

JEOFAILS.

See PRACTICE, CIVIL — PLEADING, 1; SURETIES, 1.

JUDGMENT.

1. *Judgments, void and voidable — When may be impeached collaterally.*—The judgment or decree of a court of competent jurisdiction cannot be reversed or inquired into in a collateral proceeding, except for fraud. But a void judgment may be impeached collaterally.— Higgins v. Peltzer, 152.
2. *Married women, judgment against — Execution, sales under.*— A judgment at law against a married woman is void, and an execution sale under it will convey no title.— *Id.*
3. *Judgment, impeachment of collaterally — Married women.*— The principle that a party cannot impeach a judgment in a collateral proceeding, does not apply to the case where defendant is a *feme covert* and not *sui juris.*— *Id.*
4. *Pleadings — Demurrer—Judgment on not* res adjudicata.—Demurrer being filed to a petition on the ground of certain formal defects, a final judgment thereon, and which does not reach the merits of the case, is no bar to a subsequent suit between the same parties touching the same cause of action.— Wells v. Moore, 227.
5. *Ejectment — Irregularities in proceedings affecting title may be investigated, when.*— In an ejectment suit, irregularities in the entry of a judgment or issue of an execution or mode of advertisement thereunder, in proceedings through which the parties to the ejectment suit derived title, but to which they were strangers, cannot be shown in evidence. Those errors are such as could only be looked into in a direct proceeding instituted for that purpose.— Winston v. Affalter, 263.
6. *Judgment cannot be impeached collaterally.*— Judgment against a party duly notified and brought within the jurisdiction of the court, is valid until reversed or annulled in a proceeding instituted for that purpose, and cannot be impeached collaterally.— Martin v. McLean, 361.

See ATTACHMENT, 2; COSTS IN CIVIL CASES, 2; EXECUTION, 6; RECORDS, 1.

JURISDICTION.

See CONSTITUTION OF THE UNITED STATES, 3; HABEAS CORPUS, 1; MANDAMUS, 1; PRACTICE, CIVIL—PARTIES, 1; PRACTICE, CRIMINAL, 11, 15; PRACTICE, SUPREME COURT, 8.

JURY.

1. *Cities, actions against — Jurors — Special* venire.— In an action against the city of St. Charles, where some of the jurors were residents and tax-payers, plaintiff would be entitled to a special *venire* for jurors who owned no property in the city. But notice of such *venire* will not be granted after the jury is called.— Rose v. City of St. Charles, 509.

See EQUITY, 6; PRACTICE, CIVIL—APPEAL, 4; PRACTICE, CIVIL—TRIALS; PRACTICE, CRIMINAL.

JURY, GRAND.

See PRACTICE, CRIMINAL, 3, 4.

JUSTICES' COURTS.

See PRACTICE, CRIMINAL, 15.

JUSTICES OF THE PEACE.

See CONVEYANCES, 5.

L

LANDLORD AND TENANT.

1. *Landlord and tenant — State constitution — Military seizure — U. S. constitution — U. S. statute of limitation.* — Section 4, art. XI, of the State constitution cannot be interposed to protect a tenant from payment of money due his landlord, although the money so due had been seized in the hands of the tenant by military authorities, to satisfy an assessment against the landlord for disloyalty. In so far as it protects the tenant from payment of his rent, in such case, it impairs the obligation of his contract with his landlord, and is null and void. But if the action by the landlord is not brought till more than two years have elapsed after the commission of the trespass, the Congressional statute of limitation (12 U. S. Stat. at Large, 757) will constitute a sufficient defense. — Clark v. Ticknor, 144.
2. *Landlord and tenant — Re-valuation of property at fixed periods — Forfeiture.* — Where, by the terms of a lease, the rent was to be fixed every ten years by a re-valuation of the property by appraisers — one to be appointed by the two parties in interest, and they to choose a third in case of disagreement — if, at the time of re-valuation, some of the parties in interest can make no appointment, being minors, the other party in interest cannot proceed *ex parte* to an appraisement, but the old rent will continue, and a forfeiture will be prevented by tendering that amount. — Holmes v. Shepard, 600.
3. *Equity — Conditions in lease, owing to causes not contemplated, impossible to fulfill.* — When, from causes not contemplated by the parties, the conditions of a lease can be carried out only by the assistance of a court of equity, the party suffering thereby is the only one who can apply for such aid. — *Id.*

See CONTRACTS, 4; FORCIBLE ENTRY AND DETAINER, 4.

LANDS AND LAND TITLES.

1. *Deed — Reference to survey in — Effect of.* — Where no other description is given of the land sold than by the number of the lot in the survey of a tract of land or the plan of a town or an addition to the same, the authentic map of such survey is as much a part of the deed as though set out in it. — Dolde v. Vodicka, 98.
2. *Estoppel* in pais — *Boundary line — Improvement, acquiescence in.* — Without any agreement more than is implied from their acts, if two persons trace their dividing line, and both recognizing it as such, one goes forward with the knowledge and acquiescence of the other, and makes valuable improvements, so valuable as to work great injury to the party making them if the line be disturbed, the other will be estopped from afterward alleging such mistake as shall deprive the builder of his improvements; and especially if the party seeking to disturb the line knew at the time the improvements were made, all that he subsequently learned, or if he had the means of knowledge. In such case it is not necessary to show actual fraud in the party estopped. — *Id.*
3. *Eminent domain — Street opening — Land taken for — Adverse claimant. — Statute of frauds — Action for money paid.* — When a municipal corporation takes land for public use, the title passes by mere operation of law, without any conveyance, and the transfer is not within the statute of frauds. Hence, where land claimed by opposite parties is condemned for street pur-

poses, the rightful owner may treat the proceedings as regular and affirm the transfer to the city as valid, without a written transfer, as in case of the wrongful seizure and sale of personal property which passes by mere delivery, and may sue the opposite claimant for the money received by him in payment for the land. In such case the law creates a privity of estate between the parties, as in case of personal property, which will lay the foundation for this action.

A suit of the latter nature is not technically a trial of title, although involving the question who was the true owner at the date of the survey. The title at the time of bringing the action is not in dispute.—Tamm v. Kellogg, 118.

4. *Real estate—Mistaken boundary line—True line must govern, when—Adverse possession.*—If two adjoining proprietors are divided by a line which they suppose to be the true one, each claiming only to the true line wherever it may be, they are not bound by such supposed line, but must conform to the true one when it is ascertained. But if these proprietors fix upon certain monuments or clearly-defined mark of their division line, and each holds open, notorious and continued possession to such line, claiming it to be the true one; or if one holds such possession up to such boundary, claiming it to be the true line, and the other party acquiesces or fails to take steps to disturb his possession, it is adverse, and the statute of limitation will apply.

In the absence of intention to hold adversely, however, the presumption will be that he designed to hold only to the true line, whatever that might be.—*Id.*

5. *Vendor and vendee—Part performance—Attachment.*—Where the vendee of land has paid the purchase-money, taken possession and made improvements, the vendor is seized to his use, and the title in the vendee is subject to attachment and sale under execution.—Neef v. Seely, 209.

6. *Ejectment—Irregularities in proceedings affecting title may be investigated, when.*—In an ejectment suit, irregularities in the entry of a judgment or issue of an execution or mode of advertisement thereunder, in proceedings through which the parties to the ejectment suit derived title, but to which they were strangers, cannot be shown in evidence. Those errors are such as could only be looked into in a direct proceeding instituted for that purpose.—Winston v. Affalter, 263.

7. *Sheriff's deed—Relates back, when.*—Where sheriff's sale was made before the commencement of a suit in ejectment, but the deed was dated afterward, it relates back to the day of sale so as to vest the title in the purchaser from that time. This rule, however, does not hold where the rights of purchasers for a valuable consideration without notice intervene.—*Id.*

8. *Vendor's lien—Unpaid purchase-money—Land sold for—Title obtained.*—Where the vendor of land obtains judgment to foreclose his vendor's lien for the unpaid purchase-money, and sells the land thereunder, his title passes from him so that he cannot thereafter assert it; nor can those claiming under him.—*Id.*

9. *Deed, sheriff's—Relates back to sale, when.*—A sheriff's deed will relate back to the date of the execution sale, as to parties having actual notice of the sale, and takes effect from that date. And in such case notice of the sale is virtually notice of the deed.—Shumate v. Reavis, 333.

LANDS AND LAND TITLES—(*Continued.*)

10. *Lands and land titles — Possession — Notice.*— Possession, although not actual notice of title, is evidence of such notice to be submitted to the jury. — *Id.*

11. *Sheriff's deed — Title — Execution of deed.*—A sheriff's sale, although manifested by a writing signed by the sheriff, does not pass the title of the debtor. To do this a deed must be executed by the sheriff.— Strain v. Murphy, 337.

12. *Sheriff's deed—Relates back—Intervening rights of strangers.*—A sheriff's deed, as to the debtor and his privies, relates back to the time of the sale, but not so as to cut out the intervening rights of strangers.— *Id.*

13. *Ejectment — Trespasser.*— In an action of ejectment, a mere trespasser cannot raise the question of notice as between other parties.— *Id.*

14. *Sheriff's deed— Recital—What particularity required.*—A sheriff's deed is not bad because its recitals omit the day of the month when the sale was made, where they show that the sale was made during the term of court and while the court was actually in session.— *Id.*

15. *Lands and land titles — Fraudulent misrepresentations — Diligence — — Confidence — Proof of fraud, etc.*— Fraudulent misrepresentations and concealment by the vendor of land as to the nature, quality, quantity, situation and title thereof, in order to entitle the vendee to relief, must be in reference to some material thing unknown to the vendee either from want of examination or from want of opportunity to be informed. And if the buyer trusts to representations which are not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily in his reach, he must suffer the consequences of his own folly and credulity. The vendee must go further and show that some deceit was practiced for the purpose of putting him off his guard, or that special confidence was reposed in the representations of the vendor, and that the contract was made and entered into upon the strength of that confidence. And in such cases there should be the clearest proof of the fraudulent misrepresentations.— Langdon v. Green, 363.

16. *Limitations — Adverse possession, what necessary to constitute.*— A title under the statute of limitations is as good as any other; but, in order to create such title, the possession must be open and notorious, and continuing under claim of ownership. It must be such as to notify the real owner, at least as against him, of the possession and claim; and where continued for the statutory period, the title vests, and if the claimant dies in possession before the title becomes perfect, a continued like possession by his heirs will perfect it. — Fugate v. Pierce, 441.

17. *Limitations — Statute of 1847 — Claims under — There must be ten years' possession subsequent to 1847.*— One entering upon land prior to the limitation act of 1847, and relying upon that act, must show not only ten years' possession, but possession for ten years subsequent to the passage of the act.— *Id.*

18. *Limitations — Adverse possession — Possession of part, with claim to the whole.*— One who takes actual, adverse possession under color of title, is held to be possessed of the contiguous land covered by the instrument under which he claims; but such possession is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instru-

LANDS AND LAND TITLES—(*Continued.*)
ment giving color and defining boundaries, as well as actual possession of a part. And this doctrine is not contrary to a proper interpretation of section 5, article 1, of the limitation act of 1847. (See R. C. 1845, p 1046.)—*Id.*

19. *Ejectment — Inconsistent defenses.*— In ejectment, defendant cannot deny the title of the grantor of plaintiff, and yet claim as purchaser under his grantor. Such defenses are inconsistent, and, when entering upon his proof, defendant may be compelled to elect between them.— *Id.*

20. *Lands and land titles—Tenancy in common—Adverse possession—Ouster.* —The possession of land held by one tenant in common is construed as the possession of all, unless by his denial of their right, or by holding adversely, his co-tenants are ousted.—*Id.*

21. *Possession, adverse — What sufficient against a stranger.*—Mere possession, although for less than ten years, and although the entry were tortious, is sufficient against a stranger.— *Id.*

22. *Lands and land titles — Abandonment.*— The mere leaving of premises, after destruction of the improvements thereon, *animo revertendi*, is not an abandonment. But otherwise if they are wholly given up with no intention of reclaiming them.—*Id.*

23. *Deeds — Acknowledgments of by justice — County where land does not lie — Effect of — Notice.*— Prior to the act of 1847, an acknowledgment taken before a justice of the peace, in a county where the lands do not lie, is a nullity, and the record of a deed so acknowledged imparts no legal notice. But if the deed was actually put upon record, and if the purchaser saw that record, it would be very strong if not conclusive evidence of actual notice. Notice in such case is a question of fact, and anything tending to prove it is competent evidence.

If, in the neighborhood where the party to be charged with notice resides, the ownership of property is notorious, it is a fact to be considered as tending to show that he was advised of such ownership.— Musick v. Barney, 458.

24. *Evidence — Deeds — Imperfect acknowledgments — Proof — Construction of statute.*— Under the act of 1847 (Wagn. Stat. 595, §§ 35, 36) copies of the record of instruments drawn theretofore and imperfectly acknowledged can not be received in evidence without satisfactory proof of the execution of the original and the truth of the copy.— *Id.*

25. *Lands and land titles—Adverse possession, what sufficient.*— Proof of the fact that one cut rails from a tract of land and paid taxes on it for several years, erected a temporary structure upon it, which he afterward removed, and openly claimed it as his own, where it further appears that he failed to occupy, improve or inclose it, is not sufficient to make out a case of adverse possession. In order to bar the true owner, the adverse possession must be such that it may be presumed to have been known and acquiesced in by him. The indications of the claim and possession should be so patent that he could not be deceived, and so that if he remains in ignorance it is his fault.

Where there is occupation and improvement, knowledge may be presumed. But such knowledge cannot be predicated upon acts of ownership merely.—*Id.*

26. *Lands and land titles—Possession under claim as heir—Declarations, etc.* —Where one goes into possession under color and claim of title, as heir of his father, his possession is that of tenant in common with the other heirs. His declarations that he claims the whole for himself, and intends to give what

LANDS AND LAND TITLES--(*Continued.*)

he thinks right to the other heirs, cannot make his possession adverse to them.—*Id.*

27. *Ouster — Co-tenancy — Adverse possession — Limitations, statute of.*— A conveyance of an entire tract of land by the grantor to one tenant in common as a sole owner, amounts to an ouster of his co-tenants, and the statute of limitations commences running in favor of his grantee from that time.—Long v. Stapp, 506.

28. *Spanish laws — Seal not necessary to pass title.*— Under the Spanish laws a deed was not necessary to convey the legal title. Any instrument showing the intention of the grantor, whether under seal or not, was sufficient. And under that law a parol partition was sufficient even if possession had not been taken under it.— *Id.*

29. *Co-tenants — Adverse possession — Statute of limitations — Improper record and acknowledgment.*— In ejectment by one tenant in common against his co-tenant, for an undivided interest in certain lands claimed to be derived from a common grantor, where defendant relies solely on adverse possession and the statute of limitations, he cannot object that plaintiff's title papers are improperly acknowledged or recorded; for defendant cannot claim to have been a purchaser of plaintiff's undivided interest for a valuable consideration without notice — *Id.*

See CONVEYANCES; DOWER, 1; EJECTMENT; FORCIBLE ENTRY AND DETAINER; GUARDIAN AND WARD, 1, 2; RAILROADS, 1, 2, 3; REVENUE, 2, 5, 6; SALES, 10; SHERIFFS' SALES, 1; VENDOR'S LIEN, 1, 2.

LARCENY.

See CRIMES AND PUNISHMENTS, 3.

LEASE.

See GUARDIAN AND WARD, 2; LANDLORD AND TENANT, 2, 3.

LICENSE.

See ATTORNEYS AT LAW, 1, 2; CRIMES AND PUNISHMENTS 4, 5; REVENUE, 22.

LICENSE, BROKERS'.

See REVENUE, 4, 8.

LIEN, MECHANIC'S.

See MECHANICS' LIENS.

LIEN OF TAXES.

See REVENUE, 23.

LIEN, VENDOR'S.

See VENDOR'S LIEN.

LIMITATIONS.

1. *Limitations — Adverse possession, what necessary to constitute.* — A title under the statute of limitations is as good as any other; but in order to create such title, the possession must be open and notorious, and continuing under claim of ownership. It must be such as to notify the real owner, at least as against him, of the possession and claim; and where continued for the statutory period, the title vests, and if the claimant dies in possession before the title becomes perfect, a continued like possession by his heirs will perfect it. —Fugate v. Pierce, 441.

LIMITATIONS—(*Continued.*)

2. *Limitations — Statute of 1847 — Claims under — There must be ten years' possession subsequent to 1847.*— One entering upon land prior to the limitation act of 1847, and relying upon that act, must show not only ten years' possession, but possession for ten years subsequent to the passage of the act. — *Id.*

3. *Limitations — Adverse possession — Possession of part, with claim to the whole.*—One who takes actual, adverse possession under color of title, is held to be possessed of the contiguous land covered by the instrument under which he claims; but such possession is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession of a part. And this doctrine is not contrary to a proper interpretation of section 5, article 1, of the limitation act of 1847. (See R. C. 1845, p. 1046.)— *Id.*

4. *Lands and land titles — Tenancy in common—Adverse possession—Ouster.* — The possession of land held by one tenant in common is construed as the possession of all, unless by his denial of their right, or by holding adversely, his co-tenants are ousted.— *Id.*

5. *Possession, adverse — What sufficient against a stranger.*—Mere possession, although for less than ten years, and although the entry were tortious, is sufficient against a stranger.— *Id.*

6. *Ouster — Co-tenancy — Adverse possession — Limitations, statute of.* — A conveyance of an entire tract of land by the grantor to one tenant in common as a sole owner, amounts to an ouster of his co-tenants, and the statute of limitations commences running in favor of his grantee from that time.— Long v. Stapp, 506.

7. *Co-tenants—Adverse possession—Statute of limitations—Improper record and acknowledgment.*— In ejectment by one tenant in common against his co-tenant, for an undivided interest in certain lands claimed to be derived from a common grantor, where defendant relies solely on adverse possession and the statute of limitations, he cannot object that plaintiff's title papers are improperly acknowledged or recorded; for defendant cannot claim to have been a purchaser of plaintiff's undivided interest for a valuable consideration without notice.— *Id.*

See ADMINISTRATION, 4; CONSTITUTION OF THE UNITED STATES; COUNTIES, 2; EQUITY, 1; LANDLORD AND TENANT, 1; LANDS AND LAND TITLES, 1, 25, 26.

LIQUOR, SELLING WITHOUT LICENSE.

See CRIMES AND PUNISHMENTS, 4, 5.

LOST INSTRUMENT.

See EVIDENCE, 14, 15.

M

MANDAMUS.

1. Mandamus *to inferior court having judicial functions will not lie, when.*— *Mandamus* will not lie from the Supreme Court compelling the judge of an inferior court to issue an injunction, even in vacation, where in his opinion the bill shows no equity. (Wagn. Stat. 1028-9, § 6; *id.* 1032, § 24.)

In such case the judge acts in a judicial capacity, and while this writ would

MANDAMUS—(*Continued.*)

compel him to take some action in the premises it could not force him to render any particular judgment or decision. And no distinction exists, in the application of this principle, between a temporary and final injunction. The Supreme Court has no original jurisdiction in a suit of this character, and cannot assume it indirectly by passing upon a bill brought forward before a lower court.—State ex rel. Sparks v. Wilson, 146.

2. *Mandamus — Appropriations — Warrants on treasurer.*—The return of the treasurer on an application for a *mandamus*, that the appropriation has been exhausted, is sufficient.—State ex rel. Blakeman v. Hays, 604.

See REVENUE, 8.

MANUFACTURERS' SAVINGS BANK.

See REVENUE, 20.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MECHANICS' LIENS.

1. *Mechanics' liens — House building — Contract with husband, where land belongs to wife — Construction of statute — Judgment against whom.*—In a mechanic's lien suit for charges in building a house, the petition is not bad because it states that the contract was made with the husband, while the land belonged to the wife. Under section 21 of the mechanics' lien law (Wagn. Stat. 911), the contract must have been made for her use. But no general judgment should be rendered against the wife. So far as she is concerned, the proceeding should be only against the property improved by the building.—Burgwald v. Weippert, 60.

See CONTRACTS, 9.

MILITARY ORDERS.

See CONSTITUTION OF MISSOURI, 1, 2; CONSTITUTION OF THE UNITED STATES, 2, 3; MILITARY SEIZURE.

MILITARY SEIZURE.

1. *Landlord and tenant — State constitution — Military seizure — U. S. constitution—U. S. statute of limitation.*—Section 4, art. XI, of the State constitution cannot be interposed to protect a tenant from payment of money due his landlord, although the money so due had been seized in the hands of the tenant by military authorities, to satisfy an assessment against the landlord for disloyalty. In so far as it protects the tenant from payment of his rent, in such case, it impairs the obligation of his contract with his landlord, and is null and void. But if the action of the landlord is not brought till more than two years have elapsed after the commission of the trespass, the Congressional statute of limitation (12 U. S. Stat. at Large, 757) will constitute a sufficient defense.—Clark v. Ticknor, 144.

2. *War, usages of — Seizure of property — Article XI, section 4, effect of.*—The seizure and sale of property by military officers does not pass title, unless such seizure is warranted by the usages of war; but section 4, article XI, of the State constitution is valid for the purpose of protecting such officers from prosecutions for unlawful seizures made during the late rebellion.—Williamson v. Russell, 185.

MISDEMEANOR.

See CRIMES AND PUNISHMENTS; PRACTICE, CRIMINAL, 11.

MISTAKE.

See CONTRACTS, 6; JEOFAILS; LANDS AND LAND TITLES, 4; SALES, 18.

MORTGAGES AND DEEDS OF TRUST.

1. *Agency — Deed of trust — Fraud* — Res gestæ.—The grantor in a chattel deed of trust remained in possession, and failed to have it recorded within the proper time, but requested the recorder to file it for record and return it, saying that there was some trouble about the property and he might wish to alter it. The property being attached in the hands of the grantor, on the claim that the deed was fraudulent, and being replevied by the grantee, the former would be held to have acted as agent of the latter in the transaction with the recorder, and his statements would bind the grantee, in the absence of any proof that the grantor was wrongfully in possession of the property, or that the grantee repudiated his transaction with the recorder.— Haenschen v. Luchtemeyer, 51.

2. *Mortgage with power of sale — Deed by mortgagees, when construed as an execution of a power — When not.* — Land having been conveyed by mortgage with power of sale, a simple conveyance of the property by the mortgagee, without any reference in his deed to the power or to the nature of his interest in the property, merely conveyed to the vendee the estate and power of sale, subject to the mortgagor's equity of redemption. But the deed conveyed title sufficient to enable the grantee to sue in ejectment.

   In order to execute a power it is not absolutely essential that a deed should recite or even refer to the power, where it was manifestly the intention of the party to execute it. But where the maker has an estate which will pass without executing the power, and the instrument is silent on that point, as in the case supposed, the law will presume that he intended to convey such estate and no more.— Pease v. Pilot Knob Iron Co., 124.

3. *Mortgage — Conveyance by mortgagee after condition broken — Payment of amount secured, etc.* — When the money secured by a mortgage is paid off by the assets of the mortgagor before sale by the mortgagee, sale by the latter is unauthorized and will convey no title.

   A mortgage, though a conveyance in fee upon conditions, is, even after the conditions are broken and the legal title passes, merely a security for the debt, which security is extinguished and the title reinvests whenever the debt is paid.— *Id.*

4. *Mortgage—Attachment—Title under mortgage prevails, when.*—Title under a mortgage on real estate, not recorded at the institution of a suit by attachment on the same land, will prevail over that acquired by the purchaser at the execution sale under the attachment, if the mortgage be recorded prior to the sale. The holder of the mortgage title is not estopped from asserting his claim by reason of his failure to record the mortgage prior to the attachment. — Sappington v. Oeschli, 244.

5. *Mortgage — Ejectment.* — A mortgage title is sufficient after forfeiture to authorize an action of ejectment.— *Id.*

6. *Sheriff — Deed of, relates back to sale, when.*—When no rights intervene, a sheriff's deed under a mortgage sale will relate back to the time of the sale under the foreclosure, so as to vest title in the purchaser from that time.—*Id.*

7. *Practice, civil — Joinder of actions — Mortgage — Seal — Cause of action — Remedy.* — A prayer, embraced in proceedings to foreclose a mortgage,

MORTGAGES AND DEEDS OF TRUST--(*Continued.*)

asking the court to find that the seal of the mortgage was omitted by mistake and to supply it by a special order, does not constitute a distinct cause of action, but merely affects the remedy.— McClurg v. Phillips, 315.

8. *Mortgage without seal may be enforced in equity.*— To authorize the foreclosure of a mortgage under the statute, and a general judgment and execution for any balance that may remain due after the sale of the mortgaged premises, the instrument must be regular; but if irregular, as where the mortgage seal is omitted, it nevertheless is valid to create a lien — a trust for the benefit of the creditor — which can be enforced in equity.— *Id.*

9. *Deed of trust — Name of trustee may be supplied by a court of equity.*— Where the name of the trustee in a deed of trust was omitted in making out the deed, but the grantor gave the *cestui que trust* verbal authority to fill up the blank with the name of some suitable person, a court of equity has the power to reform the instrument and supply the name of the trustee.— Burnside v. Wayman, 356.

10. *Mortgagee, purchase by at his own sale, effect of.*—A mortgagee with power of sale is a trustee as well as a creditor, and cannot at his own sale become a purchaser, directly or indirectly, so as to cut off the equity of redemption. But such sale is good as to everybody and for all purposes, excepting only that the mortgagor has the right to pay the debt and redeem the land.— Reddick v. Gressman, 389.

11. *Mortgage — Condition broken — Ejectment.*— The mortgagee, after condition broken, may maintain ejectment for the mortgaged land.— *Id.*

12. *Mortgage — Debt payable in installments — Non-payment of single note— Power to sell in case of.*—Where a debt in a mortgage is payable in installments, the condition is broken by non-payment of any one of them, and the mortgagee may thereupon enter or bring ejectment. And it is no defense to such a suit that all the installments are not due. The authorization contained in a mortgage, to sell only in event that "the said notes should not be well and truly paid," should be construed to mean in case they should not be paid as they respectively become due. And the mortgagee is not by such condition compelled to wait till the last note is dishonored before applying his remedy.— *Id.*

13. *Deed of trust — Chattel — Sale — Trover.*— A trustee in a chattel deed of trust has a right to the possession of the property even after sale for the purpose of delivering it to the purchaser. And in case possession is withheld, the trustee may sue in replevin, or, so far as defendant is concerned, in damages for conversion of the property.— Pace v. Pierce, 393.

14. *Trustee must act for the advantage of the debtor, etc.*— A trustee, in exercising his duties and powers under a trust deed, is a trustee for the debtor, and is bound to act in good faith and adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor.— Chesley v. Chesley, 540.

See COURTS, COUNTY, 3, 5; EXECUTION, 3; PRACTICE, CIVIL — PLEADING, 12.

N

NELIGENCE.
See DAMAGES, 2, 3.

NEW TRIALS.
See PRACTICE, CIVIL; NEW TRIALS.

NORTH MISSOURI RAILROAD.
See RAILROADS, 8.

NOTICE.
See ATTACHMENTS, 3, 6; CONVEYANCES, 5, 7; EJECTMENT, 5; EQUITY, 8; LANDS AND LAND TITLES, 10, 23.

O

OBLIVION AND INDEMNITY.
See CONSTITUTION OF THE UNITED STATES, 1.

OFFICERS.
See CONSTITUTION OF MISSOURI, 5; EXECUTION, 3; GARNISHMENT, 1; GOVERNOR, 1; MANDAMUS, 2; PRACTICE, SUPREME COURT, 8; REVENUE, 6, 12; SCHOOLS, 1, 2; SHERIFF.

ORDINANCE OF CONVENTION OF 1865.
See REVENUE, 13.

P

PACIFIC RAILROAD.
See BONDS, PACIFIC RAILROAD; RAILROADS.

PALMYRA, CITY OF.
See REVENUE, 1.

PARTITION.

1. *Equity — Partition sale of lands under — Person having interest not a party — Action to set judgment aside, etc.*—One claiming an interest in lands sold in a partition suit, to which he was not a party and by which he was not bound, is not entitled to a decree in a court of equity setting the proceedings aside on the ground that the same were fraudulent and void.—Peak v. Laughlin, 163.
2. *Partition — Sale — Fraud — Reversal of proceedings — Estoppel.*—Parties in interest in a partition suit, who receive their land at the partition sale, make no complaint of any unequal distribution, and permit the purchasers to make valuable improvements, and show no fraud or mistake in the proceedings, will be estopped from afterward taking advantage of an irregularity in the order of sale, and having them reversed and a new partition ordered. *A fortiori* would an outsider champertously purchasing, for purposes of speculation, the interest of a party to the original suit who was not disposed to litigate, be forbidden thus to annul the sale.—Peckman v. Meatt, 345.
3. *Partition — Sale — Proceeds, receipt of — Affirmance.*—A partition sale is not like that by a sheriff *in invitum*, but by the voluntary act of the parties,

PARTITION—(*Continued.*)

and in general a receipt by them of the proceeds is such an affirmance of the proceedings as waives any right by them to ask for a reversal; although *semble*, that where fraud is shown, the rule is otherwise.—*Id.*

PARTNERSHIP.

1. *Partnership — Admissions of members.*— The admissions and declarations of one of the partners touching a partnership transaction bind the remaining members of the firm.—Henslee v. Cannefax, 295.

2. *Specific performance — Partnership — Covenant — Estoppel.*— A. sold out his interest in a partnership with B. to C., on condition that C. should pay the amount of a note from himself to B., and that B. should then surrender to him the note. *Held*, that the note having been paid and C. put in possession in his place, and in all respects treated by B. as partner, the latter could not afterward claim that C. had failed to perform certain acts necessary to consummate the new partnership, and so refuse to deliver the note.—Waterman v. Johnson, 410.

3. *Administrator of deceased co-partner — Bondsmen not liable for malversation of partnership effects.*— The sureties on the bond of an administrator of the individual estate of a deceased co-partner are not liable for his malversation of partnership assets. The inventory and appraisement, provided for in sections 53 and 54 of the Administration Act touching partnership estates (Wagn. Stat. 78), are for the purpose of ascertaining the inventory of the deceased member, but they do not authorize the administrator on the personal assets to take charge of the partnership property or exercise any control over the same. Such acts are not within the sphere of his duties, and his bond does not cover them. He may take out letters of administration on the partnership estate, but in that case he must give a new bond, and he acts in a new, separate and distinct capacity —Orrick, Adm'r of Vahey, v. Vahey, 428.

See ADMINISTRATION, 5; EQUITY, 7.

PAYMENTS, APPLICATION OF.

See CONTRACTS, 9.

POWER OF SALE.

See MORTGAGES AND DEEDS OF TRUST, 2.

PRACTICE, CIVIL.

1. *Practice, civil — Review, petition for.*— If a defendant is in court, either by summons or voluntary appearance, a petition by him for review (Wagn. Stat. 1054, § 13) will properly be dismissed — Tennison v. Tennison, 110.

2. *Practice, civil — Appearance — Motion to file answer.*—The appearance of a party and offer to file his answer, in obedience to an order of court, although made out of time, is a technical appearance, amounting to a motion for leave to file the answer. And the motion being overruled, he should except and move to set aside the default, and bring the case to this court by proper steps. —*Id.*

See JUDGMENTS; JURISDICTION; SHERIFF, 3.

PRACTICE, CIVIL — ACTIONS.

1 *Agency — Collector liable to principal, in what cases.*— In suit for moneys charged to have been collected on execution and not paid over, defendant

PRACTICE, CIVIL — ACTIONS—(*Continued.*)

should not be charged with goods sold defendant by the execution-defendant not actually applied on the execution, or not received by him as collector; but where, at the execution sale, he bade in property in his own name, and entered satisfaction of the execution to the extent of the bid as for cash received, and treated the property as his own, he would be liable for that amount to his principal.— Warren v. Hawkins, 137.

2. *Practice, civil — Actions — Money paid* — Ignorantia legis.—Where a lessee agreed to pay to the lessor at a future day named, the amount of a certain sewer tax-bill on condition that the latter would pay it in the first instance, the lessee would be liable to the lessor for the amount in an action for money paid, although before suit was brought the bill proved to have been illegal and uncollectible. — Soulard v. Peck, 477.

See EJECTMENT; INJUNCTION; PRACTICE, CIVIL — PLEADING, 10, 17· REPLEVIN.

PRACTICE, CIVIL— APPEAL.

1. *Practice, civil — Exceptions signed by bystanders.*— Under the statute (Wagn. Stat. 1044), if the judge refuses to sign a bill of exceptions, and permits one to be signed by the bystanders to be filed, the record should show it, and in that case it becomes a part of the record. If he refuses permission, the reason should be stated, and the bill does not become part of the record, but the original paper is sent up with copies of the affidavits filed in its support.— Downing v. Shacklett, 86.

2. *Supreme Court — District Court — Act of February 18, 1871 — Failure to appeal.*— Under the act of February 15, 1871 (Sess. Acts 1871, p. 16), where appellant had been, on the 8th of November, 1870, entitled to an appeal from the District to the Supreme Court, but had failed to perfect his appeal, respondent would not for that reason be entitled to an affirmance.— May v. Bunch, 261.

3. *Judgment — Costs — Appeal.* — A judgment for costs will not support an appeal.— Couch v. Fisher, 371.

4. *Practice, civil — New trial — Verdict — Jury, conduct of.*— The refusal of a court to grant a new trial, where a motion is based on alleged absence of any testimony to warrant a verdict, is not error unless the preponderance of evidence against the verdict is so strong as to raise a presumption of prejudice, corruption, or gross ignorance on the part of the jury.— Price v. Evans, 396.

See CERTIORARI; PRACTICE, SUPREME COURT.

PRACTICE, CIVIL — NEW TRIALS.

1. *Supreme Court, practice in — Reversal of cause — New trial, etc.*—When the Supreme Court directs that the judgment of the court below be reversed and the cause remanded, the case must be proceeded with in the lower court in accordance with the rulings expressed in the opinion, although a new trial is not in terms ordered.— State v. Newkirk, 472.

2. *Practice, civil — New trial — New evidence.*—Where a new trial is awarded, whether in a civil or criminal case, the parties are always permitted to introduce new evidence, whether the reversal was on a question of law or fact, or both.— *Id.*

PRACTICE, CIVIL — PARTIES.

1. *Practice, civil — Parties — Jurisdiction — Misjoinder.* — When two or more persons are proper parties to proceedings, plaintiff may institute them against all in the county where either may reside; but he cannot, for the purpose of obtaining jurisdiction over a non-resident of the county, improperly join one who is a resident. — Kerrin v. Roberson, 252.

2. *Administration — Administrator and administrator* de bonis non *— Joinder as defendants.* — The administrator *de bonis non*, and not the creditor, is the proper person to pursue the estate. But this principle cannot authorize a creditor to join both parties defendant in a proceeding to set aside their several settlements for fraud. If the action be well grounded, the judgment should be to set aside the old settlement, in whole or in part, and order a new one. But neither in setting aside the old settlement nor making the new one, can any judgment be rendered against the administrator *de bonis non.* So far as a proceeding to set aside their settlements are concerned, their accounts are separate and independent, and there is no reason why they should be joined. — *Id.*

See BILLS AND NOTES, 1; EJECTMENT, 6; FORCIBLE ENTRY AND DETAINER, 4; STREETS, 4.

PRACTICE, CIVIL — PLEADING.

1. *Pleading — Motion to amend — Verdict — Statute of Jeofails.* — An answer which might be a proper subject for a motion to make it more definite, where the meaning of the pleader is unmistakable will be sufficient after verdict. — Hay v. Short, 139.

2. *Pleading — Recoupment — Judgment for, when in excess of amount sued for.* — Prior to the code, if a defendant was entitled to an amount of damages for breach of the contract sued on, he could not, as defendant, obtain the "affirmative relief" to which he was entitled, but must commence a new action. Now, under section 2, article XI, p. 1051, Wagn. Stat., he may recover in the same action the amount by which his claim exceeds that of plaintiff, whether such claim be in the nature of set-off or recoupment. Both species of cross-action are now embraced in the term "counter-claim." (Wagn. Stat. 1015-16, § 12; Language of Holmes, J., in Jones v. Moore, 42 Mo. 419, touching definition of counter-claim, criticised.)—*Id.*

3. *Practice, civil — Demurrer — Filing of out of time.* — Permission to file a demurrer after the time originally fixed for pleading has elapsed, may be exercised in the sound discretion of the court. — Peak v. Laughlin, 162.

4. *Pleading — Demurrer — Wrongful levy — Petition, allegation in — Jurisdiction.* — A petition by a railroad company against a city collector for wrongfully levying on plaintiffs' property to satisfy a tax, when the pleading only attacks the form and manner of making the assessment, but sets out no facts showing that the assessment was void, is bad on demurrer. If the city had jurisdiction over the subject-matter, that would amount to a protection of the officer in executing his process.—City of Jefferson v. Pacific R.R., 190.

5. *Practice, civil — Pleading — Misjoinder — Motion to elect.* — In an action against a sheriff, where the petition charges him in one count with failure to levy upon goods and lands of an execution-debtor, and with failure to make return of the execution at the proper term, and the damages are charged but once, and are predicated upon both causes of action, the pleading is doubtless

PRACTICE, CIVIL — PLEADING — (*Continued.*)
bad, but should be corrected by motion to elect, before pleading over. Where no such motion is made, the cause should be treated as regular, with damages separately charged for each breach of duty.—Stevenson v. Judy, 227.

6. *Practice, civil — Reply — Failure to file — Trial — Instruction.* — Where parties have gone through the evidence in a cause precisely as though a reply had been filed, and it was manifestly omitted by mistake, the court should not instruct the jury to take the allegations of new matter in the answer as admitted, but should give the case to them upon the pleadings as they had been understood and acted upon by the parties, or direct a reply to be at once filed to meet the case as tried. Defendants, after standing by and seeing heavy costs accumulate in making out plaintiff's case on the theory that a reply had been filed, will not be permitted to assert the contrary.— Henslee v. Cannefax, 295.

7. *Practice, civil — Court — Items.*— In a suit by an agent, where the petition, though setting out several distinct items and claiming judgment for each, is founded on matters growing out of the same alleged agency, it may be treated as containing but one count.—Newton v. Miller, 298.

8. *Demurrer must assign reason.*— Where the reason for a demurrer is not assigned therein, the demurrer should be disregarded. (Wagn. Stat. 1015, § 71.)—McClurg v. Phillips, 315.

9. *Practice, civil — Joinder of actions — Mortgage — Seal — Cause of action— Remedy.*—A prayer embraced in proceedings to foreclose a mortgage, asking the court to find that the seal of the mortgage was omitted by mistake and to supply it by a special order, does not constitute a distinct cause of action, but merely affects the remedy.— *Id.*

10. *Mortgage without seal may be enforced in equity.*— To authorize the foreclosure of a mortgage under the statute, and a general judgment and execution for any balance that may remain due after the sale of the mortgaged premises, the instrument must be regular; but if irregular, as where the mortgage seal is omitted, it nevertheless is valid to create a lien — a trust for the benefit of the creditor — which can be enforced in equity.— *Id.*

11. *Practice, civil — Counts — Misjoinder.* — A petition containing a count praying for equitable relief, and another separately stated asking for the foreclosure of a mortgage, is not bad for misjoinder.— Burnside v. Wayman, 356.

12. *Petition—Count — Recoupment — Dismissal.*—Where two counts of a petition embrace separate and distinct causes of action, dismissal of one of them will carry with it that of a plea of set-off or recoupment, set up as a defense therein, although on the other count judgment goes for plaintiff.— Martin v. McLean, 361.

13. *Practice, civil — Pleading — Allegata and probata — Amendment, order for.*—Where parties are misled by an allegation in the petition, they should follow the statute (Wagn. Stat. 1033, § 1) and obtain an order compelling the amendment of the petition upon terms. If they are surprised, an amendment may entitle them to a continuance at the cost of the adverse party.— Fischer v. Max, 404.

14. *Ejectment — Inconsistent defenses.*— In ejectment, defendant cannot deny the title of the grantor of plaintiff, and yet claim as purchaser under his grantor. Such defenses are inconsistent, and, when entering upon his proof, defendant may be compelled to elect between them.— Fugate v. Pierce, 441.

PRACTICE, CIVIL—PLEADING—(*Continued.*)

15. *Set-off — Recoupment — Counter-claim.*—Under the term "counter-claim" is included what was before known as matter of set-off and recoupment.—Gordon v. Bruner, 570.

16. *Actions — Conversion — Tort may be waived, etc.*—In case of the conversion of personal property, where the same has not been sold by the wrong-doer, but still remains in his hands, the owner may waive the tort and sue as for goods sold and delivered.

In suit on a note given by the vendor of land for the purchase-money, defendant may recoup the value of a crop taken from the land by the vendor after sale.— *Id.*

17. *Practice, civil — Set-off and recoupment — Distinction between.*— The distinction between set-off and recoupment is now important only from the fact that the former must arise from contract, and can only be used in an action founded upon contract; while the latter may spring from a wrong, provided it arose out of the transaction set forth in the petition, or was connected with the subject of the action.— *Id.*

18. *Recoupment — Affirmative judgment may be given defendant in.*— Under the present code, defendant may recover a balance found to be his due, as well by recoupment as by set-off.— *Id.*

See CONTRACTS, 10; DAMAGES, 2; SURETIES, 1.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil — Jury not a matter of right in chancery cases.*— A suit alleging the cancellation and delivery of a note by mistake, and asking for relief, and that defendant be decreed to pay, etc., may properly be treated by the court as a bill in equity; and defendant therein is not entitled to a jury as a matter of right. Issues may be framed and submitted to a jury, but that is a matter of discretion and not of absolute right.—Weil v. Kume, 158.

2. *Evidence — Instructions — Weight of evidence.*— Courts have no right to instruct juries touching the sufficiency or weight of evidence.— Gilliam v. Ball, 249.

3. *Practice, civil — Reply — Failure to file — Trial — Instruction.*— Where parties have gone through the evidence in a cause precisely as though a reply had been filed, and it was manifestly omitted by mistake, the court should not instruct the jury to take allegations of new matter in the answer as admitted, but should give the case to them upon the pleadings as they had been understood and acted upon by the parties, or direct a reply to be at once filed to meet the case as tried. Defendant, after standing by and seeing heavy costs accumulate in making out plaintiff's case on the theory that a reply had been filed, will not be permitted to assert the contrary.— Hensleo v. Cannefax, 295.

4. *Practice, civil — Motion to strike out evidence as insufficient.*— There is no law in this State authorizing the court, at the close of plaintiff's case, to strike out his testimony on the ground that the same is insufficient to make out a case for plaintiff. Where there is a total want of evidence, the court may instruct the jury to that effect and direct them to find for the adverse party. But where there is any evidence conducing to prove the issue for which it is offered, it must go to the jury, who are the exclusive judges of its weight.— McFarland v. Bellows, 311.

PRACTICE, CIVIL — TRIALS — (*Continued.*)

5. *Verdict — Jurymen — Testimony of as to.*— Jurymen will not be permitted to testify what transpired in the jury-room in making up their verdict.— *Id.*
6. *Instructions must be taken as a whole.*— The fact that isolated instructions are partial or misleading will not authorize a reversal where the instructions taken as a whole present the case properly.— Sears v. Wall, 359.
7. *Practice, civil — Instructions by court and counsel.*— When counsel present to the court correct views of the law, in a clear and distinct form, and so as not to mislead the jury, the better practice is for the court to adopt the instructions thus presented. Yet the judge has a right to present his own views in his own language; and often, from the obscurity or multiplicity of instructions presented by counsel, it is his duty to do so.-- Harman v. Shotwell, 423.

See Costs in Civil Cases; Practice, Civil—New Trials; Replevin, 1.

PRACTICE, CRIMINAL.

1. *Practice, criminal—Trial — Jurors—Appeal — Bill of exceptions — Motion in arrest.*—Where the record in a criminal cause shows that defendant was tried by a jury of six men, without also showing that he waived his right to a panel of twelve jurors, defendant will be entitled to a reversal on appeal to this court. In such case, the motion in arrest having been filed, this court will inspect the record, and, if error appears, will reverse, even where no bill of exceptions is made out.

   In criminal cases, whatever is good in arrest may be reached by writ of error.— State v. Van Matre, 268.

2. *Practice, criminal — Errors — What must appear from bill of exceptions.* — In a criminal cause the objection that it does not appear that the court ever made an order directing a grand jury to be summoned, if not brought to the attention of the lower court, is raised in the Supreme Court too late. In criminal cases such errors as appear upon the face of the record, or such as may be taken advantage of by motion in arrest or by writ of error, will be noticed in the Supreme Court, as a matter of course. But as to exceptions taken in the progress of the trial, and as to motions for new trial and in arrest, which can become a part of the record only by bill of exceptions, the same rules are applicable as in civil cases, and in order to be reviewed in the Supreme Court they must be brought up by bill of exceptions.— State v. Connell, 282.
3. *Practice, criminal —Grand jury — Adjourned term.*—Under section 13, p. 1083, Wagner's Statutes, a grand jury may be summoned at an adjourned term.— *Id.*
4. *Practice, criminal — Grand jury, summoning of — Objections to array — Statute, construction of.*—The objection in a criminal cause, that no order was made by a Circuit Court for summoning a special grand jury, is, in effect, a challenge to the array, and under the statute (Wagn. Stat. 1081, §§ 2, 3) is not permissible. And the rule is not shaken by the fact that the accused was not present at the session of the grand jury and had no opportunity to make his objections or exercise his right of challenge.— *Id.*
5. *Practice, criminal — Civiliter mortuus.*— A criminal may be convicted of murder committed while in confinement in the penitentiary under sentence of imprisonment for life. (Wagn. Stat. 515, § 23; *id.* 989, §§ 14, 15.)— *Id.*

PRACTICE, CRIMINAL — (*Continued.*)

6. *Practice, criminal — Weight of evidence — Verdict.* — In criminal cases the Supreme Court will not interfere on the ground that the verdict is against the weight of evidence, unless it was on that account manifestly unjust.—*Id.*

7. *Practice, criminal— Instructions may be given by the court, when.*—Where instructions, from their number and verbosity, have a tendency to confuse rather than enlighten and guide the jury, courts may properly refuse them altogether and substitute a few clear, precise and intelligent instructions of their own, covering the law of the case.— State v. Ott, 326.

8. *Practice, criminal — Indictment — Trial — Prisoner must be present.*— Unless it appears from the record on appeal that a prisoner indicted for felony was present in court during the trial and at the rendition of the verdict, the cause will be reversed and a new trial granted.— *Id*

9. *Indictment — Liquor — Selling without license.*— The selling of liquors without license is not an offense subject to be proceeded against by indictment, unless defendant consents to that mode of prosecution. (State v. Huffschmidt, 47 Mo. 73, affirmed.)—State v. Dougher, 409.

10. *Indictment — Selling liquor without license, etc.*— Indictment will not lie for selling whisky without a license, where defendant does not waive his objections to the mode of prosecution. (State v. Huffschmidt, 47 Mo. 73.)—State v. Snider, 409.

11. *Practice, criminal — Misdemeanor — Information — Repeal of law — Jurisdiction.*— Under the act touching laws, etc. (Wagn. Stat. 895, § 7), the court continued to have jurisdiction over one charged on information with a misdemeanor, notwithstanding that the act authorizing such proceeding was repealed pending the trial.— State v. Ross, 416.

12. *Indictment —Plea of guilty—Jurisdiction.*—Where a person charged with an indictable offense voluntarily submits himself to the jurisdiction of the court by pleading guilty, the judgment is good and will not be reversed. (State v. Warnke, 48 Mo. 451.) — State v. Coover, 432.

13. *Practice, criminal — Writ of error — Motion for discharge — Construction of statute.*— Under the act touching appeals and writs of error in criminal cases (Wagn. Stat. 1112, § 2), where defendant filed a motion to be discharged, which motion was sustained, the State would be entitled to a writ of error, notwithstanding the provisions of sections 13 and 14 of the same statute (p. 1114.) — State v. Newkirk, 472.

14. *Practice, criminal — Motion for discharge — Judgment on, a final judgment — Construction of statute.*— A case may be brought to the Supreme Court from a judgment on a motion to discharge defendant. That judgment *pro hac vice* is a final one, as contemplated by Wagn. Stat. 1112, section 2, art. VIII, and in such a case no motion for rehearing is necessary.— *Id.*

15. *Criminal law — Possession of burglarious tools after commission of crime — Proof touching, withdrawal of.*— In an indictment for burglary, proof showing that burglarious tools were found in the trunk of defendant eight days after commission of the felony, in connection with other testimony showing his guilt, is competent; and where the evidence *aliunde* is ample to convict, the withdrawal of such proof from the jury is not an error of which the defendant can avail himself.— State v. Dubois, 573.

PRACTICE, CRIMINAL — (*Continued.*)

16. *Justices' courts — Misdemeanors — Appeals — Discharge of defendant.*— Where appeal is taken from the judgment of a justice of the peace in St. Louis, on the ground that the case involves a higher grade of misdemeanor than is triable before a justice, the Circuit Court has no right to discharge the defendant. But the case must proceed in some way, either on a new information to be filed, or on the original information made before the justice. If the original information were sufficient, there would be no necessity for filing any other.—State v. Barada, 504.

See CRIMES AND PUNISHMENTS; PRACTICE, CIVIL — NEW TRIALS, 1, 2.

PRACTICE, SUPREME COURT.

1. *Practice, civil — Supreme Court — Evidence.*— In law cases this court will not weigh the evidence.— Long v. Eaton, 115.
2. *Evidence — Supreme Court.* — This court will not in a law case balance the evidence.— Hay v. Short, 139.
3. *Practice, criminal — Errors — What must appear from bill of exceptions.* —In a criminal cause the objection that it does not appear that the court ever made an order directing a grand jury to be summoned, if not brought to the attention of the lower court, is raised in the Supreme Court too late. In criminal cases such errors as appear upon the face of the record, or such as may be taken advantage of by motion in arrest or by writ of error, will be noticed in the Supreme Court, as a matter of course. But as to exceptions taken in the progress of the trial, and as to motions for new trial and in arrest, which can become a part of the record only by bill of exceptions, the same rules are applicable as in civil cases, and in order to be reviewed in the Supreme Court they must be brought up by bill of exceptions.— State v. Connell, 282.
4. *Practice, civil — Supreme Court — Appeal — Failure of order.* —Where the record shows no order granting an appeal, the case will be stricken from the docket.— Ray v. Ray, 301.
5. *Testimony, weight of — Supreme Court.*— This court will not determine the weight of testimony in civil law cases.— Langdon v. Green, 363.
6. *Practice, civil — Evidence — Supreme Court.*—This court will not review the facts when the evidence is conflicting.— Price v. Evans, 396.
7. *Practice, civil — Evidence — Motion for new trial — Supreme Court.* — An objection to the admission of testimony, not urged upon the attention of the court, and not incorporated in the motion for new trial, will not be inquired into in the Supreme Court.— Saxton v. Allen, 417.
8. *Practice, Supreme Court — Trial of clerks before for misdemeanor — Construction of statute.*—Sections 18-23 of the statute concerning clerks (Wagn. Stat. 259-60), subjecting the clerks of courts to trial in the Supreme Court for misdemeanor in office, is unconstitutional. The Supreme Court has "appellate jurisdiction only" (State Const., art. VI, § 2), except that it may issue certain specified writs "and other original remedial writs" (*id.* § 3). And the statutory proceeding for trying a clerk for misdemeanor in office can not be brought within the exception.— State ex rel. Attorney-General v. Flentge, 488.

See COSTS IN CIVIL CASES, 1; MANDAMUS, 1; PRACTICE, CIVIL— APPEAL; PRACTICE, CIVIL — NEW TRIALS, 1.

PRIOR CONVICTION.
See PRACTICE, CRIMINAL, 5.
PROCESS.
See SHERIFF, 3.
PUBLICATION, ORDER OF.
See ATTACHMENT, 3.

R

RAILROADS.
1. *Eminent domain — Railroads — Statute — What uses public.*—The Hannibal & St. Joseph R.R. Co. are authorized under the statute (Wagn. Stat. 298, § 2, subd. 7) and charter (§ 5), to condemn land for purposes of depots, engine-houses and repair-shops. Such use is a public use, for which property may be taken against the owner's consent.—Hann. & St. Jo. R.R. Co. v. Muder, 165.
2. *Railroads — Condemnation of lands — Proceedings for — Allegations in.*—In proceedings to condemn lands for railroad purposes, an allegation in the petition that the parties could not agree upon the proper compensation to be paid for the land proposed to be taken, is a sufficient averment of the fact of disagreement to put the adverse party upon his defense upon the merits.—*Id.*
3. *Eminent domain — Benefits, assessment of — Exceptions, etc.*—Where proceedings of commissioners appointed to assess damages for taking of railroad lands are regular, and there is nothing to show that they erred in the principles upon which their valuation was made, exceptions to the proceedings should be overruled.—*Id.*
4. *Damages — Railroad — Negligence — Selection of employee, care used in — Pleadings.*—A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care is responsible to all other servants for any damage that may arise. But in such case his responsibility is for his own negligence, and not merely for that of his servants. Hence an action against a railroad company for the killing of an employee by a co-employee, which charges that defendant failed to employ skillful servants, but fails to allege want of care and diligence in the selection of servants, is bad on demurrer. If the officers have made careful inquiry into the habits and competency of the employees, and upon such inquiry believe and have reason to believe them sober, competent and careful, they are not liable for the injuries resulting from the negligence of the co-employee.

And the mere allegation that defendant allowed its employees to neglect their duties, without alleging how or wherein, is not sufficient to charge liability on the company.—Moss v. Pacific R.R. Co., 167.
5. *Railroad companies — Damages — Freight depots — Negligence.*—Under section 5 of the damage act (Wagn. Stat. 520), taken in connection with section 43 of the act concerning railroads (Wagn. Stat. 310–11), railroad companies are not, regardless of the question of negligence, liable for the killing of stock in incorporated towns or cities, near their freight and passenger depots, where goods are wont to be received and shipped, although the track, at the point of the accident, was unfenced.—Lloyd v. Pacific R.R. Co., 199.
6. *Railroads — Damages — Adjoining owner — Fencing — Statute, construction of.*—A railroad company is liable to an adjoining proprietor for damage

RAILROADS—(*Continued.*)

caused by the failure of the company to fence in his land along its track. The provision of the statute requiring such fencing (Wagn. Stat. 310-11, § 43) is not unconstitutional. The Legislature may have no right to subject one person to expense for the sole benefit of another, but in the case supposed the protection of the property of adjacent proprietors is merely an incidental object of the statute. Its main and leading object is the protection of the public. And the liability of the road for such failure to fence extends not only to cases where the traveling public would be endangered by the act which caused the damage to the adjoining owner — as in case of a collision with his cattle — but to those where, by reason of the failure of the road to fence, cattle strayed from the track on to the land bordering the road, and destroyed the crops. If the obligation to fence may be imposed at all, it is absolute and unqualified, and those who disregard it may not say that this or that special liability is an improper one.— Trice v. Hann. & St. Jo. R.R. Co., 438.

7. *Eminent domain — Country roads crossing railroads — General grant.*— Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of its organization, cannot be inferred from the general grant of power to establish a road across its track, but such general grant is sufficient to warrant the laying of a road across its track whenever public necessity demands it; and as to whether that public necessity exists, the city council must be the judge.— City of Hannibal v. Hannibal & St. Jo. R.R. Co., 480.

8. *Revenue — North Missouri R.R. — Ordinance of 1865 constitutional.*—The convention ordinance of 1865, providing that an annual tax of ten and fifteen per cent. of the gross earnings of the North Missouri Railroad Company should be paid to the State in lieu of other taxation, and applied in payment of the debt due from the State on the bonds issued by the State to that company, is not repugnant to the constitution of the United States in any of the following particulars:

1. It does not violate articles V and VII of the amendments of the United States constitution. Those articles were not designed as limitations upon State governments in respect to their own citizens, but exclusively as restrictions upon Federal power.

2. The act of February 16, 1865, providing that the mortgage of the State on the North Missouri Railroad, taken to secure the amount guaranteed by the State to aid in the completion of the road, should be released and made a second lien, was a contract with the State. But the ordinance of 1865, referred to, did not impair the obligation of that contract between the railroad and the State. There is nothing in that act to prevent the State from exercising the sovereign right of taxation. The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume that the State intends such exemption. Obviously the matter of taxation did not enter in the act, but was left where it was found before.

3. The ordinance is not unconstitutional by virtue of the clause imposing uniform taxation on all property. The ordinance itself is a part of the constitution, and cannot be nullified by the more general provision relating to the subject of taxation.

RAILROADS—(*Continued.*)

4. The ordinance of 1865 is not unconstitutional on the ground that the assessment is not in the nature of a tax. Although not levied and obtained directly for purposes of revenue, the assessment is a tax. It was raised for the purpose of paying the State's indebtedness. When money is once raised by taxation it is revenue, without regard to the purpose to which it is appropriated or applied.—North Mo. R.R. Co. v. Maguire, 490.

See BONDS, PACIFIC RAILROAD, 1, 2; DAMAGES, 1; EVIDENCE, 5; PRACTICE, CIVIL—PLEADING, 4; REVENUE, 12.

REAL ESTATE AGENTS.

See CONTRACTS, 7; REVENUE, 22.

RECORDS.

1. *Records—Courts—Correction of—Judgments and entries by—In what manner.*—The correction by a court of an erroneous judgment is not permissible, but the correction of an erroneous entry of a correct judgment is legitimate, even after the case has gone to another court.—Pockman v. Meatt, 345.

See CONVEYANCES, 5, 6; EVIDENCE, 7, 8, 14, 15; EXECUTION, 6.

RECOUPMENT.

See PRACTICE, CIVIL—PLEADING, 2, 13, 16, 17, 18.

REFERENCES.

1. *Referee—Additional testimony.*—When a case is referred back to a referee after report filed, to re-state an account, the hearing of additional testimony is a matter resting very much in his discretion.—Franz v. Dietrick, 95.
2. *Referee, report of—Appeal—Evidence, weight of*—The report of a referee in stating an account is equivalent to a special verdict, and will not be disturbed on appeal, as being against the weight of evidence.—*Id.*

REPLEVIN.

1. *Replevin—Chattels wrongfully taken, purchaser of—Knowledge of tortious taking on part of—Jury, what questions submitted to.*—Replevin will lie against the purchaser of a chattel from one who has tortiously obtained possession thereof, notwithstanding that the vendor may have been pecuniarily responsible, and that plaintiff nevertheless made no effort to hold him to accountability, where no evidence shows that the purchaser was ignorant of the wrongful nature of the taking, or that he was in fact misled by the acts or neglect of plaintiff. And instructions embodying the law of the case should submit these latter issues to the jury—Welker v. Wolverkuehler, 35.
2. *Replevin—Dismissal of suit—Damages under—Privity of title.*—Where an action of replevin against a sheriff to recover property seized under execution, was brought by a stranger having no title or interest in the property, and afterward dismissed, in assessing damages against plaintiff, the latter cannot show that the execution debtor, and consequently the sheriff who held under him, was not the real owner of the property, and hence was only entitled to nominal damages. The rule authorizing such proof of title applies only to cases where plaintiff stands in some relation of privity in respect to the property, with defendant or those from whom he derives his interest, as in Dilworth v. McKelvy, 30 Mo. 149.—Nelson, to use of Haenschen, v. Luchtemeyer, 56.

REPLEVIN — (*Continued.*)

3. *Replevin bond — Action on — Bond payable to sheriff — Remedy.* — A bond given by defendant in a replevin suit, conditioned for the delivery of the property to the sheriff instead of the plaintiff, does not conform to the statute (Wagn. Stat. 1024, § 4), and hence does not authorize a summary judgment under the statute. (Wagn. Stat. 1028, § 14.)

In such a case a motion to set aside the judgment or quash the execution, or both, is the proper course, and the party should not be driven to his writ of error.— Wooldridge v. Quinn, 425.

See MORTGAGES AND DEEDS OF TRUST, 13.

RES ADJUDICATA.

See JUDGMENTS.

RES GESTÆ.

See EVIDENCE, 14, 15; FRAUDULENT CONVEYANCES, 1; SHERIFFS' SALES, 10.

RETROSPECTIVE LAWS.

See CONSTITUTION OF THE UNITED STATES, 1.

REVENUE.

1. *Revenue—Lots held for farming—Tax upon—Collector, when not liable.*— It was competent for the Legislature to exempt from taxes of the city of Palmyra, land held and valuable only for agricultural purposes, and not laid out in town lots. (See act of Dec. 11, 1855.) But under the revenue ordinance of that city its assessor was authorized to ascertain these facts, and if the party assessed were dissatisfied with his decision he could subject it to review before the city council. And having failed to do so, he cannot hold the collector of that city in a direct action for the amount of tax collected against him on such land.— Lee v. Thomas, 112.

2. *Revenue — Tax deeds — Notice — Recital of, what insufficient.*— The recital of a collector in a tax deed, that prior to sale of the land he gave four weeks' notice thereof in the manner required by law, is insufficient; and a tax deed which contains no further recital of the time and manner of the notice conveys no title.

The deed must state the facts relating to the manner of giving notice, and not the conclusions of the ministerial officer as to their sufficiency to constitute a legal notice. His recital that notice was given as required by law amounts to nothing; and without giving the required notice the collector had no right or authority to sell.— Spurlock v. Allen, 178.

3. *Revenue — County warrant — Special fund.*— The holder of a county warrant made payable out of a special fund cannot recover in an action against the county thereon, after that fund has been exhausted.—Campbell v. Polk County, 214.

4. *Brokers — License — Savings banks, officers of — Indictment.*—Savings banks incorporated under chapter 68, Gen. Stat. 1865, p. 365, §§ 1–4, are liable to be taxed on their capital and property, but are not required to take out license as brokers under the statute on that subject. (Wagn. Stat 247.) The provisions of the statutes concerning money brokers and exchange dealers, apply only to moral agents who are capable of taking oaths and suffering the penalties inflicted for perjury. And an individual who engages in broking, not on his own account, but solely in his capacity as officer of such corpora-

REVENUE — (*Continued.*)
tion, is not subject to indictment for failure to take out a license.— State v. Field, 270.

5. *Tax deeds, not reciting notice of sale, are void.*—Under the General Statutes of 1865, p. 129, § 119 (Wagn. Stat. 1206), a tax deed which contains no recital that any notice whatever was given of the sale, is void and conveys no title. It was the duty of the collector, before selling lands on the forfeited list, to give notice as required by the above section, and it ought to appear affirmatively on his deed that such notice was given. The rights of a citizen cannot be divested by this kind of proceeding, unless it appear upon the face of the deed that the law has been strictly complied with. And even where the deed shows by its recitals that the law has been complied with, it may be contradicted as to material points by evidence, even though they are brought up in collateral proceedings.— Abbott v. Doling, 302.

6. *Revenue — Sales by collectors and sheriffs.*—A sale by a collector is entirely different in its nature and requirements from that made by a sheriff under judicial process issued by a competent court. The proceedings of the latter are subject to the supervision of the court, and the court whose process he abuses is the proper tribunal to apply the remedy. But the collector does not act under the supervision of a court. He acts at his own peril and by his own advice. Hence he must be held to a strict performance of every prerequisite required by the statute, before the title of the citizen to his property can be taken away.— *Id.*

7. *Tax title — Collector's deed — Recital in must show strict compliance with the law.*— Under the revenue act of February 4, 1864 (Sess. Acts 1863-4, p. 91, § 35), a tax deed which recites that the collector gave at least four weeks' notice of sale by publication and advertisement "in manner and form as directed by law," but contains no further allegation touching notice of sale, is void. It is the duty of the collector to set forth in his deed how and in what manner the notice was given, so that it may appear on the face of the deed that the prerequisites of the statute were complied with. The above recital is only the opinion or conclusion of the collector, which may or may not be correct. Unless it appear affirmatively from the form of the deed that all the prerequisites of the statute have been strictly pursued, the deed is invalid and conveys no title.— Large v. Fisher, 307.

8. *Revenue — County Collector — County tax, payment of — License — Construction of statute — Mandamus.*—Under the act of 1868, concerning county revenue (Wagn. Stat. 1196, § 76), and the act concerning brokers (Wagn. Stat. 249, §§ 6, 7), taken together, a county collector may levy a tax, not exceeding by one hundred per cent. the State tax, upon the license of a broker; and *mandamus* will not lie to compel the delivery of the license until such county tax is paid.— State ex rel. Meyers v. Spencer, 342.

9. *Collector — Accounts — Investigation of by County Court — Certiorari — Construction of statute.*—Where a County Court ascertained a balance to be due from the county collector to the county, ordered its payment, and, on his failure to respond, rendered judgment by default against him at the next term, and ordered execution to issue thereon (see Gen. Stat. 1865, p. 228, §§ 19-26), *held:*

1st, that the action of the court was judicial and subject to review on *certiorari.*

REVENUE — (*Continued.*)

2d, that the above provisions were not repealed by implication by the act of 1863–4 (Gen. Stat. 1865, p. 130, § 128), providing for a different method of rendering judgment. The former statute is still in force. (Saline County Subscription case, 45 Mo. 52, commented on.)— Owen v. Andrew County, 372.

10. *Collector's accounts — What mode of proceeding — Ten per cent. penalty— Examined by County Courts.* — The statutes (Gen. Stat. 1865, p. 228, §§ 19–26) were never intended to clothe County Courts with the general power of overhauling all past accounts of collectors. If a settlement regularly made and approved is to be impeached after the term of court has lapsed, and especially after the collector has gone out of office, it cannot be reached by a proceeding under the statute, but the end must be accomplished by an ordinary action; and in a proper case the courts will correct the error of the agents of the county in approving and recording an improper settlement, by giving judgment against the collector for any amount found to be still due the county, notwithstanding such approval. But in such adjustment the ten per cent. penalty to be added by the collector under the statute (Gen. Stat. 1865, p. 114, § 24) should not be charged against him. — *Id.*

11. *Collector — Lands used for agriculture — Assessments irregular and void— Remedy.* — A county collector is not personally liable for levying on land embraced within town limits and regularly assessed for town taxes, although the lands were used exclusively for agricultural purposes. It is his duty to collect all taxes contained in the assessor's list; and he has no discretion in the matter, except where property is expressly exempt from taxation by law, and the assessment is simply void. Where there is any liability he is bound to levy, and cannot be held personally liable because the levy was irregular. It was the duty of the party assessed to object to the assessment, and, if it went against him, to review it by a direct proceeding in the city court of appeals. —Walden v. Dudley, 419.

12. *Revenue — County assessor — Action of, judicial — Collector, liability of for irregular assessment.* — An assessment of stock of a railroad company in the name of the shareholders, instead of that of the corporation, is irregular. But the action of the assessor in such case is judicial, and where it appears from the tax-list that the assessor had jurisdiction over the property, *i. e.*, that it was liable to taxation in some form or other, the collector would not be liable to the tax-payer for the amount collected under such assessment, notwithstanding its irregularity. In the case supposed the tax-bill certified to the collector is a sufficient warrant, and will justify him in the proceeding. (St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 462, affirmed.)— North Missouri R.R. Co. v. Maguire, 482.

13. *Revenue — North Missouri R.R. — Ordinance of 1865 constitutional.* — The convention ordinance of 1865, providing that an annual tax of ten and fifteen per cent. of the gross earnings of the North Missouri Railroad Company should be paid to the State in lieu of other taxation, and applied in payment of the debt due from the State on the bonds issued by the State to that company, is not repugnant to the constitution of the United States in any of the following particulars:

1. It does not violate articles V and VII of the amendments of the United States constitution. Those articles were not designed as limitations upon

REVENUE — (*Continued.*)

State governments in respect to their own citizens, but exclusively as restrictions upon Federal power.

2. The act of February 16, 1865, providing that the mortgage of the State on the North Missouri Railroad, taken to secure the amount guaranteed by the State to aid in the completion of the road, should be released and made a second lien, was a contract with the State. But the ordinance of 1865, referred to, did not impair the obligation of that contract between the railroad and the State. There is nothing in that act to prevent the State from exercising the sovereign right of taxation. The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume that the State intends such exemption. Obviously the matter of taxation did not enter in the act, but was left where it was found before.

3. The ordinance is not unconstitutional by virtue of the clause imposing uniform taxation on all property. The ordinance itself is a part of the constitution, and cannot be nullified by the more general provision relating to the subject of taxation.

4. The ordinance of 1865 is not unconstitutional on the ground that the assessment is not in the nature of a tax. Although not levied and obtained directly for purposes of revenue, the assessment is a tax. It was raised for the purpose of paying the State's indebtedness. When money is once raised by taxation it is revenue, without regard to the purpose to which it is appropriated or applied.— North Missouri R.R. Co. v. Maguire, 490.

14. *Revenue — Taxation, unequal — Legislation.* — The right of determining what proportion of the burdens of taxation shall be borne by any individual or class of individuals must be determined by the Legislature where there is no constitutional restriction. And the remedy in case of unjust legislation is to be found among the constituents of the legislators, and not in the judiciary.— *Id.*

15. *Bill of rights, section 30 — Proceedings under, imperative.* — Section 30 of the Missouri bill of rights, which declares that "all property subject to taxation ought to be taxed in proportion to its value," is a prohibition against taxation in any other mode. The word *ought* therein used is not directory but mandatory.— Life Association of America v. Board of Assessors, 512.

16. *Revenue — Taxation — Exemption — Commutation — Statute, construction of.*—Section 40, in regard to the incorporation and regulation of life insurance companies (Wagn. Stat. 752), declaring that the payment of certain fees from the companies shall be received in lieu of taxes, cannot have the effect of exempting them from taxation. That section is rather an exemption than a commutation. But the Legislature has no power, under the present constitution, to exempt property from taxation, or to commute the payment of taxes. —*Id.*

17. *Revenue—Corporation, property of — Shares of stock — Assessment.*—Notwithstanding that the property of a corporation does not embrace shares of stock, and hence cannot be assessed under sections 23–4 of the statute concerning revenue (Wagn. Stat. 1169), yet, being owned by the company and in its possession, it may be assessed under the general revenue law.— *Id.*

18. *Revenue — Power of taxation may be delegated — Language used must be concise.* — The power of the State to tax all professions is unquestioned; and

REVENUE — (*Continued.*)

the State may delegate the authority, but the delegation should be made in clear and unambiguous terms. — City of St. Louis v. Laughlin, 559.

19. *Attorneys at law—License tax invalid—Charter—Rule* ejusdem generis.— The charter of the city of St. Louis, approved March 4, 1870, provided (art. III, § 9) that the mayor and city council should have power to license "auctioneers, grocers, merchants, retailers, hotels, * * * hackney carriages, omnibuses, carts, drays and other vehicles, and all other business, trades, avocations or professions whatever." The profession of "law" was not specifically enumerated in the section. *Held*, that under said provision the city council of St. Louis had no power to pass an ordinance levying a tax on attorneys at law. The rule is, where general words follow particular ones, to construe them as applicable only to persons or things of the same general character or class. And in the case mentioned, the profession of law was not *ejusdem generis*, and could not be embraced in the purview of the act.—*Id.*

20. *Revenue — Banks — Taxation, surrender of — Power to increase.* — The charter of the Manufacturers' Savings Bank of St. Louis declared that one per cent. of the net profits of the bank should be paid to the State, but contained no negative or restrictive words indicating any intention of the State to surrender the power of taxation if it saw fit to do so. *Held*, that clause of the charter referred to was a contract between the company and the State, but that an ordinance imposing a license in addition to the above one per cent. was not unconstitutional as impairing its obligation. The rule is that the Legislature has full power and control over the subject of taxation, and that this power will never be considered surrendered unless it is done expressly or by necessary implication in the charter itself.—City of St. Louis v. Manufacturers' Savings Bank, 574.

21. *Revenue—Power of taxation, delegation of.*—Where the Legislature has the power to tax an institution it may delegate that power to a city corporation. — *Id.*

22. *Revenue—Real estate agent, license of—Ordinance—Constitution.*—A general ordinance imposing a license of $100 upon a real estate agent, and not in express terms repealing a prior general ordinance imposing a license of $50, is, under section 3, article III, of the charter of the city of St. Louis, invalid. — City of St. Louis v. Sanguinette, 581.

23. *Revenue—Taxes—Lien on personal property—Lien will prevail over claims of creditors—Execution, how issued—Statute, construction of.*—For payment of taxes on the personal property of a debtor, the State has an equitable lien which will prevail over the claims of creditors; and the lien is not discharged by an assignment of the property of the debtor for the benefit of creditors. In case of such assignment the collector is authorized, under the statute (Wagn. Stat. 1188, § 26), to seize and sell the property in the hands of the assignee. The spirit of the law will treat the property as *pro hac vice* the property of the assignor, and will not drive the State into equity to enforce its claim.— State, to use of Phillips, v. Rowse, 586

See SPECIAL TAXES.

REVIEW, PETITION FOR.

See PRACTICE, CIVIL, I.

S

ST. CHARLES, CITY OF

1. *Streets, widening of — Proceedings before recorder — St. Charles, charter of — Judgment before recorder — Appeal from* — Certiorari — Section 7, art. IV, of the revised charter of the city of St. Charles (Sess. Acts 1869, p. 147) does not authorize appeals from proceedings before the recorder for the condemnation of private property, but applies only to those prosecutions, whether in State cases or cases arising under city ordinances, in which the recorder can render judgment. In the case first supposed he can render no judgment, and the appeal, if any would lie, would be from the action of the Circuit Court to whom he certifies his verdict. The fact that he presides over the jury with power to order a new inquest, and certifies their verdict to the council, does not make him a judge of the case. Nor does the charter allow an appeal from the action of the council. If parties would review such action, it must be done by *certiorari*.—City of St. Charles v. Stewart, 132.
2. *Cities, actions against — Jurors — Special* venire.— In an action against the city of St. Charles, where some of the jurors were residents and tax-payers, plaintiff would be entitled to a special *venire* for jurors who owned no property in the city. But notice of such *venire* will not be granted after the jury is called.— Rose v. City of St. Charles, 509.
3. *Street opening — City of St. Charles—Circuit Court — Appeal* —Certiorari. —Under the charter of the city of St. Charles, section 7, article IV (Sess. Acts 1867, p. 147), appeal will not lie to the Circuit Court from proceedings to condemn private property in that city for establishing or altering streets. Such proceedings can only be reviewed by *certiorari*. (City of St. Charles v. Stewart, *ante*, p. 132.) And the action of the Circuit Court in trying such a case *de novo* is outside of its jurisdiction and void.—City of St. Charles v. Rogers, 530.

ST. JOSEPH BRIDGE COMPANY.

1. *Railroad bonds — Subscription — St. Joseph Bridge Company* — Mandamus. — By the terms of the original subscription by the city of St. Joseph to the St. Joseph Bridge Company, the city agreed to deliver to the company bonds in separate installments of $50,000, one installment to be delivered upon the expenditure by the company of each successive $100,000 until the completion of the bridge. By a subsequent modifying ordinance fifty per cent. of the total amount subscribed was to be paid when called for by the company. *Held*, that the plain intent of the latter ordinance was that whenever the required amount was used in the building of the bridge, which would entitle the company to an additional installment of the bonds, they should be delivered, although that amount, or some of it, may have been derived from money arising from the city bonds theretofore transferred.— State ex rel. St. Joseph Bridge Building Co. v. Severance, 401.

ST. JOSEPH, CITY OF.

See ST. JOSEPH BRIDGE CO., 1.

ST. LOUIS, CITY OF.

1. *St. Louis, city of — City council, donation by — St. Ann's orphan asylum — Members of city council, trustees.*— None of the grants of corporate pow-

ST. LOUIS, CITY OF—(*Continued.*)

ers in the charter of the city of St. Louis authorize the city council thereof to appropriate or give away the public moneys as pure donations to any mere private institution not under the control of the city and having no connection with it. The council may exercise implied or incidental powers whenever they are necessary to carry out those clearly expressed. But such donation is not germain or incident to any power granted. The members of the city council are trustees clothed with a trust, not for the corporation as such, but for the public who have confided the authority to them. And the diversion of the money of the tax-payers for any purpose other than that which is expressed in the charter, is a perversion of the trust and an excess of authority.—Hitchcock v. City of St. Louis, 484.

2. *Streets — Improvements — Taxes for, not enforceable till entire contract is completed.* — Under the supplement to the charter of the city of St. Louis, approved January 18, 1860, assessments against adjoining property-owners for street improvements cannot be made, nor can the special tax-bills therefor be enforced, till the contract for the improvement is fully completed. By the "work" mentioned in the provision referred to, is meant all work named in the contract. The above law is not distinguishable in principle from that relating to sewers. (City of St. Louis, to use of McGrath, v. Clemens, 36 Mo. 467, overruled.) And the reason of this rule is plain; for, *e. g.*, the grading of a single lot or block, instead of that of a whole street, may be an injury and not a benefit. — City of St. Louis, to use of McGrath, v. Clemens, 552.

3. *Attorneys at law — License tax invalid—Charter—Rule* ejusdem generis.— The charter of the city of St. Louis, approved March 4, 1870, provided (art. III, § 9) that the mayor and city council should have power to license "auctioneers, grocers, merchants, retailers, hotels, * * * hackney carriages, omnibuses, carts, drays and other vehicles, and all other business, trades, avocations or professions whatever." The profession of "law" was not specifically enumerated in the section. *Held*, that under said provision the city council of St. Louis had no power to pass an ordinance levying a tax on attorneys at law. The rule is, where general words follow particular ones, to construe them as applicable only to persons or things of the same general character or class. And in the case mentioned, the profession of law was not *ejusdem generis*, and could not be embraced in the purview of the act.— City of St. Louis v. Laughlin, 559.

4. *Revenue — Real estate agent, license of — Ordinance — Constitution.* — A general ordinance imposing a license of $100 upon a real estate agent, and not in express terms repealing a prior general ordinance imposing a license of $50, is, under section 3, article III, of the charter of the city of St. Louis, invalid.— City of St. Louis v. Sanguinette, 581.

ST. LOUIS COUNTY.

See ADMINISTRATION, 7.

SALES.

1. *Sale — False representations avoid, when.* — In order to avoid a sale for that reason, the representation touching the subject-matter of the sale must not only be false, but the purchaser must be deceived by it. He must trust to it and buy on the strength of it. Thus, where the vendee examined land prior

SALES—(*Continued.*)

to purchase, he could not afterward have the sale set aside because the vendor had falsely represented the land to be wooded and smooth in surface; since as to these facts there could have been no deception.—Morse v. Rathburn, 91.

2. *Sale of land—Agency—Sub-agent, representations by.*—Where one who acts for the legal owner of land is himself the equitable owner, the representations of his agents will bind the legal owner. In such case the equitable owner is also principal.—*Id.*

3. *Sale—Report of—Filing—Statute, construction of.*—A law providing that a report of sale should be approved or rejected "at the first term thereof after filing the same" did not mean the same term at which the report was filed, but the succeeding one.—Highley v. Barron, 103.

4. *Minors—Affirmance of contracts—Property, recovery back—Refunding of money*—Infants, after they become of age, may affirm contracts not previously binding on them. Any act done by them showing an intention to affirm, such as receiving the purchase-money, with a full knowledge of all the facts, will be sufficient. And where an infant seeks to recover back his property, either real or personal, he must refund what he has received. He cannot recover so long as any part of the consideration is withheld.—*Id.*

5. *Estoppel* in pais—*Sale of lands—Improvements, etc.*—One who has received an adequate consideration for the sale of land, and stands by for years and sees it greatly enhanced in value by improvements, without warning or protest, is estopped from disavowing the sale, although the sale itself was not binding in law.—*Id.*

6. *Tender—Sale of real estate—Suit for specific performance—When tender need not be made.*—When the vendor of land claims to have rescinded, and repudiates and denies the obligation of the contract, placing himself in such a position that it appears that if tender were made its acceptance would be refused, then no tender need be made by the vendee. In such case it is enough if the latter, in a suit for specific performance, offer by his bill to bring in the money when the amount is liquidated and he has his decree for performance.—Diechmann v. Diechmann, 107.

7. *Sales cannot be impeached collaterally in ejectment.*—Where a stranger purchases lands at an execution sale, it can be impeached only by a direct proceeding, by motion to set aside the sale, or, where a deed has been made, by an action in the nature of a bill in chancery. It cannot be done in an action in ejectment.—Groner v. Smith, 318.

8. *Attachment, sale under—Notice by handbills—Purchaser at sale.*—Notice of a sale under attachment, given merely by handbills, in a county where a newspaper is published, is in law no notice at all. Where a stranger purchases for a good and adequate consideration, in ignorance of this irregularity, and receives a deed good upon its face, the sale should be received as valid, notwithstanding the sheriff's neglect in regard to the notice; and such a sale might sustain a link in a chain of title, even if the purchase were made by the execution-plaintiff, in favor of his innocent grantees. But it cannot be held to give him such an interest as to entitle him to relief in equity.—Curd v. Lackland, 451.

9. *Sales, fraudulent—Gross inadequacy of price—Fraudulent circumstances.*—When a sale is attacked as fraudulent, gross inadequacy of price is one

SALES—(*Continued.*)

of the badges of fraud, and becomes controlling when coupled with other circumstances tending to show fraud.— *Id.*

10. *Trusts—Inaccuracies in trust deeds—What will not vitiate them.*—Where notice of sale under a deed of trust sufficiently designated the property to be sold, the time and place of sale, and for what debt, and the names of the trustees were correctly printed in the body of the advertisement, a mistake in the name of one of them, at the bottom of the instrument, will not vitiate the sale.— Stephenson v. January, 465.

See AGENCY, 7; ASSIGNMENTS; ESTOPPEL, 5, 6; GOVERNOR, 1; INJUNCTION, 1; LANDS AND LAND TITLES, 5, 7, 8, 14; MORTGAGES AND DEEDS OF TRUST, 14; PARTITION, 2, 3; SHERIFFS' SALES.

SCHOOLS.

1. *School fund — Defaulting treasurer — Assignments.*— Under section 7, article VII, of the school law of 1855 (R. C. 1855, p. 1440), it would be the duty of the assignees of a defaulting county treasurer, in settling his debts pursuant to the general assignment law, to deduct an indebtedness from him to the county on account of the school fund. And for this purpose the law did not require the county to present this debt for allowance before the assignees. In fact, they have no authority to give it a preference under the assignment (R. C. 1855, p. 210, § 39), but must make the deduction under the general law, thereby *pro tanto* overruling the assignment.— Cass County v. Jack, 196

2. *School fund — Defaulting treasurer — Constitution.*— Section 7, article VII, of the school law of 1855 (R. C. 1855, p. 1440), giving a preference to the debt owing by a defaulting county treasurer to the school fund, is not unconstitutional.— *Id.*

3. *County Court — School fund — Mortgage — Sale — Powers of County Court — Laches of State officers.*— Certain land was mortgaged to the county of Ray to secure a loan of school funds. The mortgagors also gave their bond with surety to secure the loan. At the mortgage sale the land was bought in by the clerk of the County Court, for a sum equal to the principal and interest of the debt. But the sale was set aside, and the same property was re-sold to the surety for an amount considerably less than that first bid. *Held:*

1. The land could not be bought in by the County Court in the name and for the use of the county. (Wagn. Stat. 1259-61, §§ 78-81, 83, 87-89.) In the care, management and control of the fund the County Court was not the agent of the county, but acted solely under and by virtue of a statutory trust devolved upon it by the Legislature for a particular purpose.

2. The surety was liable for the difference between the sums brought at the first and second sale. The officers of the County Court, in the case supposed, were the agents of the State, and the State was not liable for losses resulting through the acts or neglects of its officers. (Marion County v. Moffet, 15 Mo. 604; Park v. State, 7 Mo. 194.)— Ray County, to use, etc., v. Bentley, 236.

4. *County Courts — School fund — Mortgage — Security — Sale, etc.*—Where there is danger that real estate, mortgaged to a county to secure the loan of school funds, may decrease in value, it is the duty of the county, if deemed

SCHOOLS—(*Continued.*)

advisable, to demand additional security, and, in case of failure to furnish the same, to order an immediate sale of the property.— *Id.*

See CONTRACTS, 4; CONVEYANCES, 3, 4, 7; PRACTICE, CIVIL — PLEADING, 10.

SERVICE.

See SHERIFF, 3.

SET-OFF.

See PRACTICE, CIVIL — PLEADING, 2, 13, 16, 17, 18.

SEWER-BILLS.

See CONTRACTS, 12.

SHERIFF.

1. *Sheriff — Bond — Action on — Money paid over under military orders — United States constitution — Impairing obligation of contract* — A sheriff is not a mere bailee of money coming into his hands, who is exonerated from liability by the exercise of ordinary care and diligence. His duty is to pay over the money to those legally entitled thereto, and his bond has the force of a contract that he will not fail upon any account to make the payment. Hence, section 4 of art. XI. of the State constitution, in so far as it releases him from such liability, even where the fund was misapplied in pursuance of military orders, is in conflict with the constitution of the United States as impairing the obligation of a contract.— State, to use of Judge, v. Gatzweiler, 17.
2. *Sheriff — Bond — Action on — Statute of limitations commences running, when — Act of Congress — Jurisdiction of Federal courts.*—A sheriff who, during the late rebellion, and subsequent to March, 1863, misapplied money in his hands, under a military order of the United States, will be protected against any action therefor in the courts of this State, brought more than two years after the date of his return showing the execution to have been satisfied. The Congressional act of limitations (12 U. S. Stat. 757) is binding on State as well as Federal courts.— *Id.*
3. *Sheriff's return — Service.*— A sheriff's return is not bad because it shows service upon two minor defendants by leaving a copy of the petition with their mother as member of the family of each.— Weber v. Weber, 45.
4. *Deed, sheriff's, without certificate of acknowledgment—Defect not remedied by clerk's minutes.*— A sheriff's deed, lacking the indorsement of clerk's certificate of his acknowledgment, cannot be shown in evidence; and the defect cannot be supplied by a transcript from the clerk's entries showing the acknowledgment and its entry upon his minutes.— Adams v. Buchanan, 64.
5. *Sheriff — Execution — Bond, action on — Measure of liability.*—A sheriff is bound to use reasonable diligence in searching for property on which to levy. It is usual for the plaintiff to point out property where it is not known to the officer; but if it were pointed out by another, or if the officer had knowledge of such property, no matter how obtained, and failed to make a levy, it would be sufficient to establish his liability on his bond. But his liability does not follow from the mere fact that there was property in possession of defendant not levied on, without proof that he knew of the property or might have ascertained about it by the exercise of reasonable diligence.— State, to use of Lowe, v. Ownby, 71.

SHERIFF — (*Continued.*)

6. *Sheriff — Bond, suit on — Default — What allegation may be inquired into after.*—In suit on a sheriff's bond for failure to levy upon property sufficient to satisfy an execution, the truth of the allegation that the sheriff had notice of the execution-defendant's having property subject to execution, is not admitted by a default taken in the case; but, under the statute (Wagn. Stat. 240, § 7), must be inquired into. Proof of the existence of such property, and consequently of his knowledge thereof, pertains to the condition and breach, not to the penalty or the execution of the bond.— *Id.*

7. *Sheriff, action against — Defendant in execution — Proof of ownership by.*— To sustain an action against a sheriff for failure to levy an execution, it is not sufficient to show merely that he was directed to levy upon certain property, without further showing that defendant in the execution had at the time some interest in the property, or such possession as would raise a presumption of ownership.—Stevenson v. Judy, 227.

8. *Damages — Action for, nominal and actual.*—Under the statute (Wagn. Stat. 614, § 64) plaintiff is not entitled even to nominal damages against a sheriff for failure to make a return within the proper time, unless he has sustained actual injury by reason of such failure.— *Id.*

See EXECUTION, 4; MORTGAGES AND DEEDS OF TRUST; SHERIFFS' SALES.

SHERIFFS' SALES.

1. *Sheriff's deed — Sale after return term, etc.*—The deed of a sheriff is not invalid because its recitals show that the land conveyed had been levied on by his predecessor in office more than a year before, when it further shows that the lands were sold at the first term at which sale could be made.— Boyd v. Jones, 202.

2. *Ejectment — Execution sale — Outstanding title.*—Defendant in an execution cannot defeat an action of ejectment brought against him by a purchaser at the execution sale, by setting up an outstanding title. And the same rule obtains in case of one claiming under such title, where he had acquired possession under defendant in the execution. If he wishes to assert his title he must first yield his possession so acquired from defendant in the execution, and then bring his action of ejectment.— *Id.*

3. *Sheriff's deed — Relates back, when.*—Where sheriff's sale was made before the commencement of a suit in ejectment, but the deed was dated afterward, it relates back to the day of sale so as to vest the title in the purchaser from that time. This rule, however, does not hold where the rights of purchasers for a valuable consideration without notice intervene.—Winston v. Affalter, 263.

4. *Sheriff's deed — Sale after first term — Recitals, sufficiency of.*—The omission in a sheriff's deed to recite the reason why the sale was not made at the first term of court to which the execution was returnable, is not such an omission as to render the deed void.— Groner v. Smith, 318.

5. *Judgments* nunc pro tunc — *Entries — Sheriff's deed, amendment of by court.* —Where a formal entry of a judgment had not been made, but it sufficiently appeared from the record that such judgment had in fact been rendered, an entry of the fact at a subsequent term might be made *nunc pro tunc* by the court. And judgment having been actually rendered so as to support an execution sale and sheriff's deed, the court could afterward permit the sheriff

SHERIFFS' SALES—(*Continued.*

to amend his return so as to show that sale was not made at the return term because the court was not then in session.—*Id*

6. *Deed, sheriff's—Relates back to sale, when.*—A sheriff's deed will relate back to the date of the execution sale, as to parties having actual notice of the sale, and takes effect from that date. And in such case notice of the sale is virtually notice of the deed.—Shumate v. Reavis, 333.

7. *Sheriff's deed—Title—Execution of deed.*—A sheriff's sale, although manifested by a writing signed by the sheriff, does not pass the title of the debtor. To do this a deed must be executed by the sheriff.—Strain v. Murphy, 337.

8. *Sheriff's deed—Relates back—Intervening rights of strangers.*—A sheriff's deed, as to the debtor and his privies, relates back to the time of the sale, but not so as to cut out the intervening rights of strangers.—*Id.*

9. *Sheriff's deed—Recital—What particularity required.*—A sheriff's deed is not bad because its recitals omit the day of the month when the sale was made, where they show that the sale was made during the term of court and while the court was actually in session.—*Id.*

10. *Evidence—Sheriff's sale*—Res gestæ.—In proceedings attacking the validity of a sheriff's sale, declarations and acts occurring at the time are admissible as a part of the *res gestæ*. And when the acts and declarations are calculated to stop the bidding, and do in fact have that effect, they will vitiate the sale, even though the sale is not made under any agreement or bargain which would otherwise invalidate it.—Griffith v. Judge, 536.

11. *Sales—Agreement to bid on for debtor, etc.—Specific enforcement.*—Where the purchaser at a sheriff's sale agreed with defendant in the execution that he would bid it off for him and give him a title bond to re-convey it to him as soon as the amount bid for it was refunded, and purchasers were prevented from bidding by acts and declarations creating the impression that the purchaser was bidding in the property for defendant in the execution, such agreement should be specifically enforced in a court of equity.—*Id*

See REVENUE, 6; SHERIFF.

SPANISH LAWS.

See CONVEYANCES, 7.

SPECIAL TAXES.

1. *Revenue—Tax-bill—Non-compliance with contract—Reduction—Mode of assessment.*—In suit on a special tax-bill, where it appeared that the work was done in a manner inferior to that called for by the contract, the jury should find for the plaintiff such, and only such, proportional amount of the sum assessed and sued on in the special bill as the work actually done in the particular instance bore to the work in such a case if done according to the contract. The damage in such case should not be distributed *pro rata* through all those assessed. The particular person injured has a right to have the special injury to himself deducted from the charge made against him.—Creamer v. Bates, 523.

See CONTRACTS, 12; STREETS, 2, 3, 4.

SPECIFIC PERFORMANCE.

See CONTRACTS, 8; SALES, 6.

STATE, LANDS HELD BY.
See CONTRACTS, 2.
STATUTE, CONSTRUCTION OF
1. *Statute, construction of—General and particular words—Rule as to.*—It is an established rule of construction, where general words follow particular ones, to construe the power as applicable to the things or persons particularly mentioned.—City of St. Louis v. Laughlin, 559.
2. *Statutes—Motives of Legislature.*—If a statute is regularly passed, the motives of the law-making power cannot be inquired into in order to invalidate it.—State ex rel. Blakeman v. Hays, 604.
See ADMINISTRATION, 6 (Wagn. Stat. 78, §§ 53, 54), 7, 8 (Wagn. Stat. 81, § 67).
ATTACHMENT, 5 (Wagn. Stat 191, § 48).
BONDS, PACIFIC RAILROAD, 1 (R. C. 1855, p. 1487; Wagn. Stat. 1281; Sess. Acts 1871, p. 80).
CHILLICOTHE, CITY OF, 1 (Sess. Acts 1869, p. 69).
CONTRACTS, 4 (Wagn. Stat. 881).
CONVEYANCES, 3 (R. S. 1835, p. 142, § 2).
COURTS, COUNTY, 3 (Wagn. Stat. 1259–61, §§ 78–81, 83, 87–89).
CRIMES AND PUNISHMENTS, 1 (Wagn. Stat. 462–3, § 56), 2 (Sess. Acts 1870, p. 45), 3 (Wagn. Stat. 457, § 26).
DAMAGES, 3 (Wagn. Stat. 520, § 5; *id.* 310, § 43).
DIVORCE AND ALIMONY, 1 (Wagn. Stat. 535, § 12).
DOWER, 4 (Wagn. Stat. 88, § 33).
EJECTMENT, 5 (Wagn. Stat. 99, §§ 38, 43).
EMINENT DOMAIN, 3 (Wagn. Stat. 328, § 4).
EVIDENCE, 3 (Wagn. Stat. 1046, § 45), 11 (Wagn. Stat. 595, §§ 35, 36).
EXECUTIONS, 4 (Wagn. Stat. 606, § 20), 6 (Sess. Acts 1863–4, p. 44).
HABEAS CORPUS, 1 (Wagn. Stat. 690, § 35).
LANDS AND LAND TITLES, 18 (R. C. 1845, p. 1046, § 5).
MANDAMUS, 1 (Wagn. Stat. 1028, § 6; *id.* 1032, § 24).
MECHANICS' LIEN, 1 (Wagn. Stat. 911, § 21).
PRACTICE, CIVIL—APPEAL, 1 (Wagn. Stat. 1044), 2 (Sess. Acts 1871, p. 16).
PRACTICE, CIVIL—PLEADING, 2 (Wagn. Stat. 1015, § 12), 9 (Wagn. Stat. 1015, § 71), 14 (Wagn. Stat. 1033, § 1).
PRACTICE, CRIMINAL, 4 (Wagn. Stat. 1081, §§ 2, 3), 5 (Wagn. Stat. 515, § 23; *id.* 989, §§ 14, 15). 11 (Wagn. Stat. 895, § 7), 13, 14 (Wagn. Stat. 1112, § 2; *id.* 1114, §§ 13, 14).
PRACTICE, SUPREME COURT, 8 (Wagn. Stat. 259, §§ 18–23).
RAILROADS, 1 (Wagn. Stat. 298, § 2, subd. 7), 6 (Wagn. Stat. 310–11, § 43).
REPLEVIN, 3 (Wagn. Stat. 1024, § 4; *id.* 1028, § 14).
REVENUE, 4 (Gen. Stat. 1865, p. 365, §§ 1–4; Wagn. Stat. 247), 6 (Wagn. Stat. 1206), 7 (Sess. Acts 1864–5, p. 91, § 35), 8 (Wagn. Stat. 1196, § 76; *id.* 249, §§ 6, 7), 9, 10 (Gen. Stat. 1865, p. 228, §§ 19–26), 10 (Gen. Stat. 1865, p. 114, § 24), 16 (Wagn. Stat. 752, § 40), 17 (Wagn. Stat. 1169, §§ 23, 24), 23 (Wagn. Stat. 1188, § 26).
ST. CHARLES, CITY OF, 3 (Sess. Acts 1867, p. 147, § 7).
SCHOOLS, 1, 2 (R. C. 1855, p. 1440, § 7).
SHERIFF, 6 (Wagn. Stat. 240, § 7), 8 (Wagn. Stat. 614, § 64).
WILLS, 3 (Wagn. Stat. 1367, §§ 20, 26).

STREETS.

1. *Streets — Become public property, how — Ordinance, acceptance of — Dedication.* — It is not necessary, in order to constitute a street or alley in a municipal corporation, that the statutory course should be pursued. Any act by the owner setting apart to the public a portion of his property, clearly showing that such was his intention, vests the use of the property in the public for the purposes indicated; and if actually thrown open, the public may take possession. In such case no ordinance or formal acceptance of dedication is necessary.— Rose v. City of St. Charles, 509.

2. *Streets — Improvements — Assessment of benefits for, how proportioned.* — The assessment for street improvements should be made in the proportion which the whole frontage of any particular lot bears to the entire work.— City, to use of McGrath, v. Clemens, 552.

3. *Streets — Improvements — Taxes for, not enforceable till entire contract is completed.*—Under the supplement to the charter of the city of St. Louis, approved January 18, 1860, assessments against adjoining property-owners for street improvements cannot be made, nor can the special tax-bills therefor be enforced, till the contract for the improvement is fully completed. By the "work" mentioned in the provision referred to, is meant all work named in the contract. The above law is not distinguishable in principle from that relating to sewers. (City of St. Louis, to the use of McGrath, v. Clemens, 36 Mo. 467, overruled.) And the reason of this rule is plain; for, *e. g.*, the grading of a single lot or block, instead of that of a whole street, may be an injury and not a benefit.— *Id.*

4. *Streets — Improvements — Action on tax-bills — City not a real party.* — In an action on a special tax-bill for street improvements, brought by a contractor to the use of a municipal corporation, the city is not the real party to the record, and no judgment can be rendered against it in such an action.—*Id.*

See HANNIBAL, CITY OF, 1, 2, 3; LANDS AND LAND TITLES, 3, 4; RAILROADS, 7; ST. CHARLES, CITY OF, 1. 8.

SUBSCRIPTION.

See CONTRACTS, 1; ST. JOSEPH BRIDGE CO., 1.

SURETIES.

1. *Bond, guardian's — Suit on — Contribution — Petition — Allegations — Verdict — Jeofails — Record — Surplusage.* — Where judgment was obtained against a surety on a guardian's bond, and the surety sued his co-surety for contribution, the failure of his petition to state that the original suit was brought in the name of the State, to the use of the beneficiaries on the guardian's bond, should not be held to vitiate his judgment. The error would be cured by verdict. And on the trial, notwithstanding such defective averment, the record in the former suit might be admitted in evidence. And no mere informalities, not sufficient to have invalidated the first judgment, ought to be considered. Nor could the record be rendered inadmissible in evidence from the fact that it embraced a copy of the guardian's bond. The latter was no part of the record, and should be treated as surplusage.— Haygood v. McKoon, 77.

See ADMINISTRATION, 4, 6; CONTRACTS, 4; COSTS IN CIVIL CASES, 2.

T

TAX TITLES.
See REVENUE, 2, 5, 6, 7.
TENANTS IN COMMON.
See LANDS AND LAND TITLES, 27, 29.
TENDER.
See SALES, 6.
TRESPASS.
See CRIMES AND PUNISHMENTS, 1; EJECTMENT, 4; EQUITY, 4.
TROVER.
See MORTGAGES AND DEEDS OF TRUST, 13, PRACTICE, CIVIL—PLEADING, 17.

TRUSTS AND TRUSTEES.

1. *Equity — Trust estate — Notice.*—One who, in consequence of a blunder in the terms of a deed, obtains the legal title to land the equitable ownership of which is in another, and has full knowledge of the fact, will hold as trustee for the latter. And a grantee, with notice from the legal owner, will be affected with the same trust.—Smith v. Walser, 250.
2. *Trustees, successors of—Appointment by deed, etc.*—By the terms of a deed conveying certain land in trust for the Pacific Railroad Company to be deeded away by the trustee on the order of the directors, in case of his failure to act, the company was authorized, "by deed duly executed, to appoint other trustees, who should by such deed be vested with power to execute the trust." *Held*, that a quit-claim deed of the property, although signed by the president and persons purporting to be the successors in the trust, conveyed no title unless said trustees were appointed to carry out the trust by deed duly executed.—Bumgarner v. Cogswell, 259.
3. *Deed of trust — Name of trustee may be supplied by a court of equity.*—Where the name of the trustee in a deed of trust was omitted in making out the deed, but the grantor gave the *cestui que trust* verbal authority to fill up the blank with the name of some suitable person, a court of equity has the power to reform the instrument and supply the name of the trustee.—Burnside v. Wayman, 357.

See GIFTS, 1; MORTGAGES AND DEEDS OF TRUST; ST. LOUIS, CITY OF, 11; SALES, 10.

V

VENDOR'S LIEN.

1. *Vendor's lien — Waiver — Taking note — Bidding in the property — Attachment.*—Although the taking of other securities will be considered as a waiver of his lien for the purchase-money by the vendor of land, in the absence of an express agreement that it shall be maintained, yet the mere receipt of a note for the purchase-money will have no such effect. Nor would the fact that he had bid in the property at an execution sale against the vendor for a nominal sum, so as to compensate him for the debt due him, amount to such surrender. Nor would the fact that he had attached the property for that and other debts, where the entire property was sold under prior attachments, and that of the vendor was of no avail, be construed to operate as a surrender of the lien.—Adams v. Buchanan, 64.

VENDOR'S LIEN—(*Continued.*)

2. *Vendor's lien — Innocent purchaser — Property bought in by attaching creditor, without notice of lien, etc.* — A *bona fide* purchaser of land, without notice of the vendor's lien, takes it discharged of any such liability. And the rule is not altered where he bought at a sale under an attachment levied by himself, if he had given credit to the debtor; because the property had been held by the latter with no apparent encumbrance, and it was the fault of the vendor claiming his lien that he had so trusted him.— *Id.*

3. *Equity — Trespass* — Ex parte *estate — Vendor's lien — Petition* — Certain separate estate was owned by a married woman, subject to the vendor's lien. Part of it was subjected to payment of her debts by a judgment, definitely describing the same. A bill being brought by the purchaser thereof at execution sale, to subject her remaining estate to the payment of the vendor's lien, on the ground that the original suit by mistake failed to embrace these lands, *held*, that the bill contained no equity, and was properly dismissed; for the proceedings under which he purchased gave him no title to said lands, and no attempt was made by suit for that purpose to reform those proceedings.— McCann v. White, 96.

4. *Vendor's lien — Unpaid purchase-money — Land sold for — Title obtained.* — Where the vendor of land obtains judgment to foreclose his vendor's lien for the unpaid purchase-money, and sells the land thereunder, his title passes from him so that he cannot thereafter assert it; nor can those claiming under him.—Winston v. Affalter, 263.

VERDICT.

See PRACTICE, CIVIL—TRIALS; PRACTICE, CRIMINAL, 6, 8.

W

WARRANTY.

1. *Equity — Bill in to set aside deed — Fraud — Encumbrance — Warranty.* — In case of a bill in equity to set aside a deed from plaintiff to defendant as being obtained by fraud, where it appears that the land was conveyed in exchange for other real estate deeded by defendant to plaintiff, which at the time was subject to an encumbrance, but the evidence showed no knowledge of the encumbrance on the part of defendant and no fraud in the transaction, plaintiff might be entitled to his action on defendant's covenant of warranty for the amount he paid to remove the encumbrance, but he could ask for nothing more.— Eddington v. Nix, 134.

See CONTRACTS, 5.

WATER-COURSES.

1. *Water-courses — Cities — Improvements — Trial — Verdict, etc.* — As a matter of law, a city, in making improvements, has no right to dam up any water-course and thereby flood the land of others, even though the water-course does not form a permanent stream. And a verdict embodying that proposition should be set aside.— Rose v. City of St. Charles, 509.

WILLS.

1. *Wills — Life estate — Survivorship — Guardianship.* — By the terms of a will, testator's daughter was to take the care of two brothers during their lives, and "in so doing" was to have the use and benefit of the personal property of the testator, and to have the possession of his land for the care and

WILLS—(*Continued.*)

support of herself and children and her brothers. A special guardian was appointed for the latter. *Held*, that under the will, in the absence of any further provision, her death having occurred before that of her brothers, her husband could not succeed to her position in the control of the property and the care of her surviving brothers. No title vested in her as trustee, and there was no trusteeship into which her husband could enter, either under the will or by virtue of a judicial appointment.

And no estate vested in her children. Their interest was through the mother, and was dependent upon her fulfilling the terms of the will in respect to the care and support of her brothers.—Richardson v. Richardson, 29.

2. *Will—Conditional clause in—Effect of.*—The opening clause of a will was as follows: "I this day start for Kentucky; I may never get back. If it should be my misfortune, I give my property," etc. *Held*, that the visit to Kentucky was not named merely as the occasion of making the will, as from its supposed risks reminding him of the necessity or propriety of the act, but that his death prior to his return from Kentucky was the condition on which the will depended for its efficacy, and in case of his return it became void.—Robnett v. Ashlock, 171.

3. *Wills, probate of.—What proof necessary to make will competent as evidence.*—In order that a will may be received in evidence, there should be some proof in writing attached to the will and recorded with it, showing that it had been duly proved. And there should be a certificate of the record of the will and proof. But the statute does not require that the proof should consist of the actual testimony in detail taken at the probate, signed by the witnesses and attested by the clerk; nor that the certificate of the clerk attached should show that it was so signed and attested. The certificate spoken of in section 20, and that in section 26 of the statute touching wills (Wagn. Stat. 1367) cannot be the same. The former is in the nature of a *jurat* to an affidavit showing that the testimony was given and subscribed in open court and before the clerk; while the latter is a certificate to the action of the court. —Charlton v. Brown, 353.

4 *Dower—Devise in will not taken in lieu of by implication.*—A devise or bequest in favor of the wife, contained in the will of the husband, will never be construed by implication to be in lieu of dower. The design to substitute the one for the other must be unequivocally expressed.—Bryant, Adm'r of Buford, v. McCune, 546.

WITNESSES.

1. *Witnesses—Where party is dead, children of other party may testify.*—Where one of the parties to a contract or cause of action is dead, the statute excludes the other party in interest from testifying, but not his children.—Anderson, Adm'r of Gentry, v. Hance, 159.

2. *Witnesses—Testimony of wife when a substantial party to suit—Construction of statute.*—It was not the intent of the statute concerning witnesses (Wagn. Stat. 1373, § 5) to exclude the testimony of a wife when she was a substantial party to the suit.—Fugate v. Pierce, 441.

WOOLEN MILLS.

See CONTRACTS, 1.

WRIT OF ERROR.

See PRACTICE, CRIMINAL, 13.